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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24561

October Term 1956

In the Matter of the Petition for
Review of the Application of

CHA'O LI CHI,

also known as Cha'o Pieh Chi,

Petitioner-Appellant,

—against—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization for the District of New York,

Respondent-Appellee.

BRIEF AND APPENDIX OF APPELLANT

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Respondent-Appellee.

BRIEF OF APPELLANT

Preliminary Statement

The petitioner appeals from a decision and order of the District Court for the Southern District of New York (McGohey, *D.J.*) granting summary judgment to the respondent and dismissing petitioner's complaint on the ground that respondent acted lawfully in concluding that petitioner had failed to establish reasonable ground for his asserted fear of persecution if returned to China (App. 12a-16a).

Statute Involved

Section 6 of the Refugee Relief Act of 1953 (67 Stat. 401, 50 U. S. App. 1971d) provides:

> "Sec. 6. Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide non-immigrant and that because of events which have occurred subsequent to his entry into the United States he is unable to return to the country of his birth, or nationality, or last residence, because of persecution or fear of persecution on account of race, religion, or political opinion, may, within one year after the effective date of this Act, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of the enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscel-

laneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided*, That the provisions of this section shall not be applicable to any aliens admitted into the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754), Public Law 402, Eightieth Congress, second session (62 Stat. 6): *Provided further*, That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand."

Questions Presented

1. Whether the administrative decision, based in part upon confidential information the broad nature of which was disclosed, was so contrary to all the evidence as to be arbitrary and capricious.

2. Whether the use of confidential information was unlawful and unconstitutional in that (A) it was not authorized by the Refugee Relief Act of 1953, (B) was prohibited by the Administrative Procedure Act of 1946, and (C) denied appellant due process of law.

Facts

Petitioner has been in the United States since he came to this country in February 1939, as a child of 11, a member of the family of his father, an accredited diplomatic official of the Chinese Nationalist Government (App. 29a). The father returned to Nationalist China on orders of his government in 1946 (App. 29a) and the rest of the family returned to China in 1950. In a deportation proceeding on December 14, 1952 petitioner was denied the privilege of suspension of deportation and voluntary departure and ordered deported to China (App. 4a). Thereafter on June 16, 1955 the Acting Regional Commissioner approved a recommendation of the Special Inquiry Officer that petitioner's application for adjustment of his status to permanent residence under §6 of the Refugee Relief Act of 1953 (50 U. S. C. App. 1971d) be denied on the ground that petitioner was inadmissible under §212(a)(27) of the Immigration and Nationality Act (8 U. S. C. 1182(a)(27)) and therefore ineligible for adjustment under §6 of the 1953 Act (App. 17a-19a).

In this action by petitioner to review the legality of this administrative decision the District Court (Noonan, *D.J.*) held that the petitioner had been denied due process of law "by reason of his not being informed of the nature of the confidential information against him" (App. 8a) and ordered that petitioner is entitled "to know the broad nature of the 'secret and confidential' information being used against him" (App. 9a).

In the reopened hearing the Special Inquiry Officer stated (App. 23a-24a) that the broad nature of the confidential information was as follows:

> "By Special Inquiry Officer: First, it is indicated that this applicant is not as anti-communistic in political

opinion as would appear from his application for adjustment of status because of his very close relationship with his half-brother, Chi Chao Ting, who in the past is reported as having been active in the communist cause. Also, because of his close relationship with his father, Mr. K. C. Chi, who, it is reported, was a former editor of the China Daily News published in the city of New York, which paper is popularly known as the Chinese communist publication in New York City, and who is reported to have returned to the mainland of China to accept a post at Peiping University under the sponsorship of the Chinese People's Republic.

Secondly, because of this applicant's own testimony to the effect that in the early days of the communist coup in China he was favorably impressed with such activity.

Third, because of his reported activity in behalf of the Chinese Students Christian Association which in 1949 was reported to have been led by pro-communist persons, at which time the applicant is reported to have upheld communism as being better than the capitalist system.

Fourth, the applicant's reported participation in a communist inspired brotherhood festival conducted at the People's Drama Theatre, 812 Eldridge Street, New York, at three p.m. Sunday afternoon, February 11, 1951.

Fifth, the applicant's close association with persons other than his immediate family reported to be active in communist activities in the United States, specifically, one Kee Min Ta.

Sixth, the applicant's reported membership in the American Youth for Democracy, an organization also reported as active in communist affairs."

A request for the specific evidence upon which these allegations were based was denied (App. 25a-26a).

As to the first allegation, the petitioner then testified that his half-brother, allegedly a communist, was a person whom he has not even seen since the time of the Bretton Woods Conference (1944) when he was an official of the Chinese Nationalist Government and therefore he could not possibly have maintained a "close" relationship with him (App. 27a-28a). As for his father, petitioner testified that he was a Chinese Nationalist Government official and returned to China in 1946 to a post at Peiping University under that Government (App. 29a) and not under the Chinese People's Republic as erroneously stated in the confidential information supplied to respondent. He further testified that the China Daily News, alleged to be communistic at the present time, could not have been so prior to 1946 and in 1940 to 1942 at which time his father was one of the editors because such activities would certainly have led to severance of his official connection with the Chinese Nationalist Government (App. 32a).

On the second charge, applicant's former testimony that he had been favorably impressed with the activity of the Chinese Communists in the early days of the communist coup in China, he explained that he was influenced by various reports of corruption in the Nationalist Government and of proposed land reforms by the communists about which he had no personal knowledge (App. 34a-36a). He testified to his disillusionment and his recognition that the communist regime had brought a repugnant terrorism and regimentation to China (App. 36a).

Petitioner denied (Third Charge) membership in or activity on behalf of the Chinese Christian Students Association or support of communism as better than capitalism (App. 36a-37a); admitted (Fourth Charge) dancing as a

professional dancer for a fee at the People's Drama Theater on one occasion but denied any knowledge of the alleged political motives of the sponsors (App. 39a). He answered the Fifth Charge of reported close association with persons reportedly active in communist matters, specifically one Kee Min Ta, by explaining that he accepted him as a roommate because of their mutual interest in professional dancing and later became aware of his political interests which petitioner did not share (App. 39a-41a).

Petitioner admitted his reported membership in the American Youth for Democracy (Sixth and last Charge) for a short time in 1943 while he was attending St. John's College. He stated that he never belonged to any other chapter of the American Youth for Democracy and at that time the chapter to which he belonged was not devoted to political affairs except the common war effort (App. 42a).

On the statutory issue of petitioner's fear of persecution if returned to Communist China he testified that he did not agree with communism on principle; that he would be unwilling to work as an entertainer for the Chinese Communist Government because he did not believe in its goals, and upon refusal to work he might very well be made an example of and imprisoned (App. 43a). He stated that he would be regarded with great suspicion in Communist China since he refused to return with his family and has consistently refused requests received from his family to return to China, and because of his residence and education in the United States since he was eleven years old and his strong attachment to the traditions of the United States (App. 42a-43a). He testified that he has never been actively in favor of communism and has been against communism and that he actually is afraid of persecution if returned to China (App. 45a).

The Special Inquiry Officer referred to the petitioner's admission of sympathy with the communist regime in China

at its beginning in the belief that it was for the betterment of the average Chinese and his testimony of his change to an anti-communist point of view because of events in China, and then concluded that petitioner failed to establish reasonable grounds for his asserted fear of political persecution in China (App. 19a). The Acting Regional Commissioner adopted the Special Inquiry Officer's recommendation that petitioner's application be denied (App. 19a). The District Court (McGohey, *J.*) granted summary judgment to the respondent on the ground that it could not be said that the Attorney General's representatives acted arbitrarily or unfairly in concluding that petitioner had failed to sustain his burden of establishing a reasonable ground for his asserted fear of persecution if returned to Communist China (App. 15a).

Argument

At the outset and in the interests of clarity the present case must be distinguished from cases in which the use of confidential information, withheld from the courts upon judicial review as well as from the alien in the administrative proceeding, presented the fundamental question whether Congress authorized the use of confidential information and if so whether such use denied due process of law. *Jay* v. *Boyd*, 351 U. S. 345; *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537. In this case the Government did not appeal from but acquiesced in Judge Noonan's decision and disclosed the broad nature of the confidential information although it continued to withhold from appellant the specific confidential information in the form of the investigative reports or the statements of informants.

The administrative decision based in part on this limited disclosure presents for judicial determination two basic questions. The first question, assuming that limited dis-

closure offers minimal procedural due process, is whether the administrative record as a whole including the disclosed information supplies substantial evidence to support the denial of appellant's application for adjustment under §6 of the Refugee Relief Act of 1953, hereinafter called the 1953 Act. If the record does not support the administrative decision it is arbitrary and invalid and the Court should rule that the appellant has established fear of persecution under §6 of the 1953 Act or, in the alternative, remand the case to the respondent for still further administrative proceedings. Only if the Court rules that the record including the confidential information sufficiently supports the administrative determination does it become necessary to reach the second question, namely, whether Congress in proceedings under §6 of the 1953 Act has authorized the use of confidential information disclosed in this limited manner.

Stated in another way, the first question is one of the scope of judicial review and the argument assumes that the limited disclosure makes the confidential information available as part of the record. The second and more fundamental question, not restricted to the facts in this case, is whether Congress has authorized the use of confidential information providing it is disclosed in this limited manner to the alien.

I.

Even if disclosure of the broad nature of the confidential information authorized reliance upon it, the administrative decision based thereon was so contrary to all the evidence as to be arbitrary and capricious.

Judge Noonan ruled that in view of the fact that §6 of the 1953 Act required the Attorney General to make a determination "based on all of the pertinent facts and circumstances, rather than merely to exercise his opinion on the matter, Congress must have intended that the alien should be informed of the nature of the information being used against him so that he might attempt to rebut it" (App. 7a). Assuming *arguendo* that disclosure of the broad nature of the confidential information was sufficient to grant appellant a procedurally adequate hearing, it is appellant's contention that the administrative determination that appellant did not establish his fear of persecution completely lacks support in the record and is arbitrary.

The respondent perforce must rely for the adverse administrative decision upon the confidential information because that is the only "evidence" in the record even allegedly adverse to appellant. The respondent must contend that disclosure of the "broad nature" of the confidential information sufficiently removed any objectionable confidential or secret stigma and transmuted it into admissible "evidence" supplying a substantial basis for the administrative decision protecting it from reversal on judicial review. Of course the respondent may also argue that the special inquiry officer relied on the specific information not disclosed and that its use is authorized by Congress and not subject to judicial review because that specific information is not in the record. This seems to have been Judge McGohey's view although not Judge Noonan's view.

The appellant contends that even the confidential information as disclosed by respondent and explained by appellant does not support the decision and that applying the proper scope of judicial review the administrative decision should be reversed.

1. *The evidence established fear of persecution.*—The reopened administrative hearing was devoted largely to the disclosure of the broad nature of the six categories of confidential information stated by the special inquiry officer (App. 23a-24a) and to the appellant's sworn testimony concerning these categories of information (App. 26a-42a). The Special Inquiry Officer expressly refused appellant's request to reveal specific information upon which the general information disclosed was based or the sources of the information (App. 23a, 25a-26a). The nature of the confidential information and appellant's evidence in respect thereto was such that upon conclusion of the hearing no rational reliance could be placed upon the confidential information as a basis for denying the application as will readily appear from brief reference to the six categories of information and appellant's testimony thereon:

a. *First charge—appellant's relationship with half-brother and father.*—The first charge that appellant's close relationship with his half-brother and father indicates that appellant was not anti-communistic in political opinion was wholly demolished by incontrovertible evidence brought out in appellant's testimony. Appellant convincingly explained that he never had the alleged close relationship with his half-brother and in any event he had not even seen him since 1944 when his half-brother was an official of the Chinese Nationalist Government. He has not seen his father since the latter returned to China in 1946. This testimony wholly disposed of the charge of appellant's

close relationship with his half-brother and father. Moreover, the allegation that his father, a former editor of the Chinese Daily News now popularly known as communistic, was "reported to have returned to the mainland of China to accept a post at Peiping University under the sponsorship of the Chinese Peoples Republic" was completely answered by appellant's testimony that his father returned to Peiping in 1946 when it was under the control of the Nationalist Government and not the Peoples Republic and by his testimony that his father was editor of the China Daily News from 1940 to 1942 when he was an official of the Chinese Nationalist Government and long before the publication was popularly known as communistic.

b. *Second charge—appellant's initial friendly reaction to Chinese Communists.*—Appellant always openly and honestly admitted that he shared with others, many of them much older and more astute politically than appellant, the illusion that communism might bring agrarian reforms and benefit the Chinese populace. But there is no suggestion that he lied when he swore that he also shared the disillusionment with Chinese Communism and deplored the terror which it practiced. There is no possible basis for disbelieving appellant's testimony that he became disillusioned and condemned Chinese Communism particularly when it is recognized as an historical fact that this was the common experience of many persons outside of China at the time of the revolution, including the highest officials of the Department of State of the United States.

c. *Third charge—activity on behalf of Chinese Christian Students Association.*—The appellant's testimony that he was never a member of or active on behalf of the Association and his express sworn denial of his reported "support of communism as better than capitalism" (App. 36a-37a)

certainly is adequate to refute a charge in such general terms where the Government refuses to specify the evidence on which such a charge is based in order to give appellant an opportunity for more specific denials. In the face of such a general charge he could do no more than deny it under oath when his position is that he never engaged in such activities.

d. *Fourth charge—participation in a communist festival at Peoples Drama Theater on February 11, 1951.*—The appellant explained that his appearance on this occasion was as a professional dancer for a fee without any knowledge of the alleged political motives of the sponsors. In view of the fact that appellant was a professional dancer his sworn explanation completely answers this charge.

e. *Fifth charge—close association with Kee Min Ta.*—Appellant completely explained that his association with this individual was based on their mutual interest in professional dancing and not in any way related to the political views of Kee Min Ta. Certainly there is no basis for disbelieving the appellant's entirely credible story that this acquaintanceship was not based on politics and its termination was based on a purely personal ground—as appellant said "He threw out my cat" (App. 40a).

f. *Sixth charge—membership in American Youth for Democracy.*—The appellant fully explained his "reported membership in the American Youth for Democracy" by sworn testimony that he was a member of one chapter of this organization for a few months in 1943 while attending St. John's College.

In addition to completely answering the charges contained in the confidential information the appellant convincingly testified that because of his long uninterrupted residence in the United States since he came here as a

child of eleven in 1939, and his education here and his attachment to our traditions, he feared persecution in Communist China where he would be regarded with great suspicion and for these reasons he had consistently refused overtures to return to China even though his entire family had returned to that country prior to the completion of the communist conquest of the mainland (App. 42a-45a). This sworn testimony supplies all the evidence that any applicant could normally be expected to supply in order to establish his fear of persecution. The Government did not in any way attempt to rebut this evidence but apparently relied entirely upon the general confidential information which he explained completely. The Special Inquiry Officer in his very short decision denying appellant's application, merely stated that despite the denial of the allegations in the confidential information appellant failed to establish reasonable grounds for his fear of persecution for his political opinions. Thus the Special Inquiry Officer apparently relied upon the general confidential information which was so completely refuted by appellant in his testimony. It is to be noted that the Special Inquiry Officer's decision recommending denial contains a general conclusion against appellant but does not even in substance comply with the requirement of the regulation (8 C. F. R. 245a.11) that he "shall prepare a memorandum of his findings as to each of the essential facts prescribed by section 6 * * *."

2. *Scope of judicial review.*—The appellant contends that the scope of judicial review of the evidence is that the administrative determination must be supported by substantial evidence. *Lloyd Sabaudo* v. *Elting*, 287 U. S. 329; *Section 10(e)(5) of the Administrative Procedure Act of 1946* (5 U. S. C. 1009); *Fong Sen* v. *Immigration and Naturalization Service*, 137 F. Supp. 236 (E. D. La.), aff'd 234 F. 2d 656 (C. A. 5). Judge Noonan's opinion recognized

that the 1953 Act requires the Attorney General "to make a determination based on all of the pertinent facts and circumstances, rather than merely to exercise his opinion on the matter (App. 7a). It is submitted that the statutory requirement that the Attorney General make an administrative determination implies the usual substantial evidence scope of judicial review.

It is submitted that Judge McGohey, in his opinion upholding the administrative decision not on the basis that it was supported by substantial evidence but rather on the basis that Congress "has vested the Attorney General with wide discretion in immigration matters" (App. 14a), erroneously relied upon two decisions of this Court (*U. S. ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 and *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392) involving not §6 of the 1953 Act but the wholly different language of §243(h) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1253(h)) which expressly authorizes the Attorney General to withhold deportation "to any country in which in his *opinion* the alien will be subject to physical persecution • • •" (emphasis supplied). See also *Jay* v. *Boyd*, 351 U. S. 345.[1]

The language of the 1953 Act, however, is so different from the language of the 1952 Act granting the Attorney General the broadest discretion to withhold or to suspend deportation that it cannot be implied that Congress intended to prohibit judicial review under the usual substantial evidence rule to determine whether the applicant under §6 of the 1953 Act had reasonable grounds for fearing

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1 In *Jay* v. *Boyd* the then majority of the Supreme Court (including Reed and Minton, *JJ.*) held that Congress in §244 of the 1952 Act (8 U. S. C. 1254) similarly authorized the denial of suspension of deportation upon confidential information utilized pursuant to a regulation requiring the officer relying on such information to be of the opinion that its disclosure "would be prejudicial to the public interest, safety or security" (8 C. F. R. §244.3).

persecution if deported. Section 6 of the 1953 Act offers the political asylum of permanent residence in the United States to any alien who "establishes" because of events subsequent to his lawful entry prior to July 1, 1953 that he is unable to return to the country of his birth, nationality or last residence because of persecution or "fear of persecution" on account of race, religion or political opinions. The first sentence of §6 which sets forth the statutory requirements for inclusion in this category of refugees does not delegate the determination of each case to the Attorney General to be decided "in his discretion" or "in his opinion," as in the case of suspension or withholding of deportation under §§243(h) and 244 of the 1952 Act. On the contrary the test of compliance with the statutory requirements is cast in objective terms in that the alien is required to "establish" that he is within the class of refugees. To the extent that the test of compliance could be considered subjective at all the determination is delegated not to the Attorney General but to the applicant in that he is not required to establish inability to return home because of actual persecution but merely because of his "fear of persecution."[2] Such an objective statutory standard at the most requires the alien applicant to establish his eligibility by substantial evidence to be considered in the first instance by the administrative officials and reviewed by the courts in accordance with the ordinary rules of administrative law which give due weight to the administrative determination.

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2 The language of §6 of the 1953 Act is very similar to the language of §4(b) of the Displaced Persons Act of 1948 (50 U. S. App. 1953(b)) which defined a displaced person residing in the United States eligible to apply for adjustment of his immigration status as "a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the out-break of World War II, and that he cannot return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions."

This view that §6 was intended to utilize ordinary standards of administrative determination of facts establishing the applicant's eligibility is reinforced by the remainder of §6 which provides that if the Attorney General "upon consideration of all the facts and circumstances of the case" shall "determine" that the alien is a person of good moral character, was present in the United States on August 7, 1953, the date of enactment of the statute, and is qualified for admission as an immigrant the Attorney General "shall report to the Congress all the pertinent facts in the case." Unless Congress affirmatively approves permanent residence for the alien the Attorney General is directed to deport him. Thus it appears that Congress reserved to itself the exercise of discretion or opinion and restricted the Attorney General to a "determination" of the facts "established" by the alien, which connotes ordinary administrative action based on the evidence and not an extraordinary delegation of the matter to the opinion or discretion of the Attorney General. *Cheng Fu Shen* v. *Barber*, 144 F. Supp. 913, 916 (N. D. Cal.).[3]

It is significant of the intent of Congress that in §6 of the 1953 Act, dealing with refugees seeking asylum in the United States, it adhered to the language of §4(b) of the Displaced Persons Act of 1948 similarly granting asylum to such persons and did not amend the language to give the Attorney General broad discretion as it did amend the language of §23 of the Internal Security Act of 1950 in §243(h) of the 1952 Act to substitute the Attorney General's "opinion" for the former requirement that the

3 Words such as "establish" and "determine," unlike words delegating matters to the Attorney General's discretion or opinion, as used for administrative proceedings, connote an adjudication based on substantial evidence. *Gooch Milling Co.* v. *Commissioner of Internal Revenue*, 133 F. 2d 131, 137 (C. A. 8); *Cole* v. *Saranac Lake General Hospital*, 282 App. Div. 626, 125 N. Y. S. 2d 891 (3rd Dept.).

Attorney General "shall find" that the alien would be subjected to physical persecution (*U. S. ex rel. Moon* v. *Shaughnessy, supra*) and as it did amend the language of §19(c) of the Immigration Act of 1917 (as amended by the Alien Registration Act of 1940) to substitute the Attorney General's "discretion" for his finding on the issue of suspension of deportation (*Jay* v. *Boyd, supra*).

It is also of some significance that in administering §4 of the Displaced Persons Act of 1948, before Congress delegated broad discretion to the Attorney General in respect of suspending and withholding deportation in the 1952 Act, the Commissioner of Immigration and Naturalization accepted the testimony of Chinese aliens concerning their opposition to communism as sufficient basis for their fear of persecution if returned to China. *In the Matter of T.-C.*, Interim Decision No. 212, decided November 7, 1950 (reported in Immigration and Naturalization Service "Monthly Review," December 1950, pp. 95-98).[4] In the 1953 Act Congress has adhered to the language of the 1948 Act and the respondent cannot claim greater discretion to reject evidence of fear of persecution under the 1953 Act because Congress has delegated broader discretion to the Attorney General on the similar question of persecution in respect of withholding deportation under §243(h) of the 1952 Act. See *D'Antonio* v. *Shaughnessy,* 139 F. Supp. 719, 723 (S. D. N. Y., Herlands, *D.J.*).

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4 This decision states in part:

"FEAR TO RETURN: The applicant's testimony above related to displacement based upon his fear of persecution will be utilized to establish that other cardinal eligibility requisite, namely, that the applicant is unable to return to the country of his birth, nationality, or last residence because of persecution or fear of persecution on account of his race, religion, or political opinions. His testimony with respect to his opposition to Communism, and the acknowledgment that China is at this time a Communist-dominated country establishes that the applicant is unable to return to China because of his fear of persecution on account of his political opinions."

Appellant's construction of §6 gains further support from the published regulations of the Attorney General (8 C. F. R. 245a). Section 245a.11 provides that the immigration officer "shall prepare a memorandum of his findings as to each of the essential facts prescribed by section 6" and that if he recommends denial "a copy of his memorandum shall be furnished to the applicant or his attorney or representative pursuant to §§292.11 and 292.12 of this chapter." Section 292.11(a) provides for service of any papers in a proceeding upon the alien's attorney and §292.12 provides that service shall be by personal service or registered mail. Section 292.11(b) provides that whenever an examination is provided for in a case before the Service the person involved shall have the right to be represented at the examination by an attorney or representative, "shall be permitted to examine or cross-examine such person and witnesses, introduce evidence, to make objections which shall be stated succinctly and entered on the record and to submit briefs." The appellant submits that the quoted regulation concerning cross-examination of witnesses clearly implies the right to a customary fair administrative hearing and the usual scope of judicial review to determine whether the administrative decision is supported by substantial evidence.

It need not be labored here that if Congress has not plainly delegated the question of fear of persecution to the Attorney General to be decided wholly in his discretion or solely upon his opinion the courts will not strain to imply such a broad delegation where there is involved the serious personal consequence of relegating to a communist country an individual who has lived in the United States under the protection of the Constitution since 1939. *Chew* v. *Colding*, 344 U. S. 590, 601-602.

In conclusion on this point the appellant submits that in §6 of the 1953 Act Congress has not departed from the

ordinary scope of judicial review to determine whether the administrative decision is supported by substantial evidence. The application of that standard of review to the facts of this case requires the determination that upon all the evidence, even including the disclosed confidential information, there is no substantial evidence to support the administrative determination and the evidence requires the contrary determination that the appellant has established fear of persecution if returned to China. It is submitted that there is no need for any further administrative hearing and the Court should direct the respondent to grant the appellant's application on the present record.

II.

Congress did not authorize use of confidential information in proceedings under §6 of the 1953 Act.

If it be determined that the administrative record supplies sufficient evidentiary support for the administrative determination it becomes necessary to decide whether Congress authorized the use of confidential information in proceedings under §6 of the 1953 Act even if the Act be construed as requiring disclosure of the "broad nature" of the confidential information. The appellant contends that (A) Congress did not authorize the use of confidential information; (B) the Administrative Procedure Act of 1946 forbids the use of such confidential information, and (C) the use of such information violated appellant's rights to due process of law under the Fifth Amendment.

A. *Congress did not authorize use of confidential information.*

In the absence of a statutory provision expressly authorizing the use of confidential information and the denial of

a hearing, such as §235(c) of the 1952 Act (8 U. S. C. 1225 (c)), the courts have approved the use of confidential information where Congress has delegated to the Attorney General the authority to grant discretionary relief on the basis of his "opinion" or in his discretion[5] apparently on the theory that Congress did not contemplate that the alien would receive a hearing in the usual sense but merely the dispensation of grace by the Attorney General as in the case of a pardon. *Jay* v. *Boyd, supra; U. S. ex rel. Moon* v. *Shaughnessy, supra.* Moreover, the use of confidential information in such cases was supported by regulations expressly permitting its use and issued pursuant to the statutory power delegated to the Attorney General to establish regulations to carry out his authority under the Act (§103(a) of the 1952 Act, 8 U. S. C. 1103(a)). See 8 C. F. R. §242.17(c) providing that the Special Inquiry Officer in determining an application for discretionary relief may consider and rely upon non-record information only when the Commissioner has determined that it is in the interests of national security and safety to do so. See also §243.3(b)(2) providing that the decision to withhold deportation shall be made upon consideration of all evidence submitted by the alien "and any other pertinent evidence or available information."

The appellant submits that Judge Noonan correctly concluded that Congress contemplated that a hearing should be obtained in proceedings under §6 of the 1953 Act and the alien should be given an opportunity to "establish" the facts and the Attorney General should make a "determination" on the facts. The necessary implication from the statutory provision contemplating a hearing is that confidential information could not be used because a "hearing" at which

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5 But cf. *U. S. ex rel. Dongas* v. *Robinson*, 142 F. Supp. 452 (N. D. Ill.), *Orahovats* v. *Brownell*, 134 F. Supp. 84 (D. C. D. C.), *Maeztu* v. *Brownell*, 132 F. Supp. 751 (D. C. D. C.).

the alien is invited to submit evidence and then the decision is made in part upon confidential information which he has no opportunity to know or meet is no hearing at all. *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9); *Boudin* v. *Dulles*, 136 F. Supp. 218, aff'd 235 F. 2d 532 (C. A. D. C.); *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. C.); *Mazza* v. *Cavicchia*, 15 N. J. 496, 101 A. 2d 545.[6]

The absence of authority to use confidential information is supported by the regulations governing proceedings under §6 of the 1953 Act which do not authorize the use of confidential information but require the immigration officer to make findings of the essential facts prescribed by §6 (8 C. F. R. 245a.11). Moreover, this regulation impliedly denied authority to use confidential information by providing that the alien shall be permitted to cross-examine witnesses (8 C. F. R. 292.11(b)). This right to cross-examine is, of course, denied by the use of confidential information even where its "broad nature" is disclosed.

Another cogent reason for not attributing to Congress an intent to authorize by implication the use of confidential information is supplied by the fact that the use of such information has been criticized in Congress itself as "at complete variance with basic common law precepts • • • ." *House Report No. 1458*, 84th Cong., 1st Sess., p. 14 (1955); *Hearings Before Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations*

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6 Chief Justice Arthur T. Vanderbilt stated:

"In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' • • • [U]nless this principle is observed, the right to a hearing itself becomes meaningless."

on "Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings," 84th Cong., 1st Sess., p. 167 (1955); cf. *Jay* v. *Boyd, supra*, p. 365.

Moreover, the administrators themselves have expressly recognized the dangers inherent in the use of such confidential information by amending the regulations to forbid the use of such information unless "the Commissioner has determined that it is in the interests of national security and safety to do so" (8 C. F. R. 242.17(c), effective November 6, 1956).[7] Immediately upon the issuance of this regulation restricting the use of confidential information appellant's counsel on November 13, 1956 wrote the Solicitor General of the United States suggesting that this appeal should not proceed but should be withdrawn upon the grant of a further administrative hearing under the new regulation. On December 26, 1956 the United States Attorney replied that it was the view of the Department of Justice that the case should not be considered further administratively but that this appeal should be defended.

Finally on this point it need not be elaborated that the courts will not extend by implication the right of administrative officers to use confidential information in view of judicial experience concerning the dangers inherent in the use of information not subject to the tests of confrontation and cross-examination.

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7 The Commissioner of Immigration and Naturalization announced in connection with the new regulation (New York Times, November 1, 1956):

> "Under the new regulation, hearing officers will not be permitted to consider or rely on information undisclosed to the alien unless the Commissioner has personally reviewed the case and has satisfied himself that every effort to develop evidence through Service investigation and investigation by other Governmental agencies has been exhausted, and that the information is of sufficient importance to the nation's safety or security as to require its submission to the hearing officer."

B. *The Administrative Procedure Act applies and forbids use of confidential information.*

The appellant contends that §§5, 7, 8 and 10 of the Administrative Procedure Act of 1946, hereinafter called the 1946 Act, apply to hearings under §6 of the 1953 Act and prohibit use of confidential information. It is true that Congress nullified the holding of *Sung* v. *McGrath*, 339 U. S. 33, that §§5 and 11 of the 1946 Act were applicable to deportation proceedings. *Supplemental Appropriation Act*, 1951, 64 Stat. 1004, 1048; §242(b) of the 1952 Act (8 U. S. C. 1252). Section 242(b) provides in part: "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." Congress left undisturbed the application of §10 of the 1946 Act (5 U. S. C. 1009) providing for judicial review of administrative orders including deportation orders. *Shaughnessy* v. *Pedreiro*, 349 U. S. 49; *Brownell* v. *Tom We Shung*, 352 U. S. 180.

The absence in the 1953 Act of an express provision, similar to the quoted provision of §242(b) of the 1952 Act, makes applicable §§5, 7 and 8 of the 1946 Act, as well as §10, to administrative hearings to determine eligibility for permanent residence under §6 of the 1953 Act. Section 12 of the 1946 Act (5 U. S. C. 1011) expressly provides: "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." In view of Congressional policy expressed in this provision and judicial policy favoring application of the remedial legislation of the 1946 Act, expressed in *Sung* v. *McGrath, supra*, it is submitted that the 1946 Act must be applied to the administrative hearing here involved in the absence of express exemption in the 1953 Act. *Fong Sen* v. *U. S. Immigration and Naturalization Service*, 137 F. Supp. 236 (E. D. La.),

aff'd 234 F. 2d 656 (C. A. 5); cf. *Cheng Fu Shen* v. *Barber*, 144 F. Supp. 913 (N. D. Cal.).

Section 7(c) of the 1946 Act (5 U. S. C. 1006) expressly provides in part: "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Section 7(d) provides in part: "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the *exclusive record* for decision in accordance with section 8 of this Act * * *" (emphasis supplied). Section 10(e) (5 U. S. C. 1009) provides in part that the reviewing court shall hold unlawful and set aside agency action found to be unlawful, unconstitutional and also unsupported by substantial evidence in any case subject to the requirements of §§7 and 8 of the Act or otherwise reviewed on the record of any agency hearing provided by statute.

Appellant submits that the use of confidential information, even though its "broad nature" was disclosed, rendered the hearing invalid under the 1946 Act.

C. *The use of confidential information denied appellant due process of law.*

If it be determined that Congress impliedly authorized the use of confidential information in this case appellant submits that it denied him due process of law to which, as a resident in the United States since 1939, he is entitled. *Chew* v. *Colding*, *supra*. Congress has approved use of confidential information, even where excluded aliens seeking admission are concerned, only in cases in which the Attorney General "after consultation with the appropriate security agencies of the Government" concludes that its disclosure would be prejudicial to the public interest.

Section 235(c) of the 1952 Act. The regulations also place such a limitation on its use as noted in *Jay* v. *Boyd, supra.* The appellant submits that its use in this case without a determination by the Attorney General, or at least by the Commissioner, that its disclosure would be prejudicial to the public interest is so unreasonable as to be a violation of due process of law. The constitutional right of the alien to a fair hearing and a fair opportunity to establish his eligibility under §6 of the 1953 Act should be limited if at all by confidential information only where a most compelling reason for its use is given. No such reason has been given and certainly the nature of the confidential information as disclosed supplies no such reason.

Disclosure of the broad nature of the confidential information does not cure the constitutional defect of its use because such disclosure does not give the appellant the necessary opportunity to examine and explain the specific evidence upon which the broad charges are based and does not give the appellant an opportunity to convince the administrative officer on the facts.

CONCLUSION

It is respectfully submitted that upon the evidence adduced at the administrative hearing before the Special Inquiry Officer the appellant has established his right to relief under the Refugee Relief Act of 1953 and the Court should direct respondent to grant appellant's application for adjustment of his status to permanent residence.

In the alternative if the Court determines that the record does not clearly establish appellant's right to relief under the Refugee Relief Act, it should remand the case to respondent for a further hearing and decision which should not be based in any respect on secret and confidential information.

Respectfully submitted,

EDWARD J. ENNIS
BENJAMIN GIM
Attorneys for Petitioner-Appellant

CLIFFORD FORSTER
of Counsel

Docket Entries

June 30—55	Filed Petition
July 1—55	Filed affdvt. and order for service by an individual.
July 12—55	Filed stip. & order substituting atty for petitioner.
July 12—55	Filed amended petition.
July 21—55	Filed further amended petition.
Aug. 3—55	Filed summons & copy of petition.
Aug. 25—55	Filed affdvt & notice of cross motion to dismiss—ret. 8-30-55.
Oct. 4—55	Filed Opinion #22,161. Pet'r's application for relief remand for hearing; request to temporary inj. granted; etc.—Settle, order —Noonan, J.—(See opinion).
July 5—55	Filed affdvt & show cause order—stay respondent, etc.—(see opinion, Noonan, J. 10-4-55).
Dec. 5—55	Filed order denying motion to dismiss; pet'n for temporary restraining order granted, etc.—Noonan, J.—Mailed notice of entry 12-6-55.
June 6—56	Filed Affdvt & Notice of motion for Review, etc. Ret. 6-12-56.
July 19—56	Filed Notice of Motion to dismiss and summary judgt.—Ret. 7-31-56
Oct. 23—56	Filed opinion #22985 denying petition and motion for summary judgment will be granted. Settle order. McGohey, J.

Docket Entries

Oct. 23—56	Filed Pltf's brief.
Nov. 2—56	Filed Stip & Order of substitution for atty of Pltff.
Nov. 5—56	Filed stip. & order staying deportation pending appeal—Herlands, J.
Nov. 5—56	Filed stip. & order—pltff to deposit $1,000 pending appeal—etc.—Herlands, J.—($1,000 dep. in Reg. a/c #1 by Cha'o Li Chi.)
Nov. 7—56	Filed order & summary judgment in favor of deft against pltff. McGohey, J. Mailed notice of entry 11-8-56.
Nov. 14—56	Filed notice of appeal by pet'r. Mailed copy to U. S. Atty 11-16-56

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Opinion of September 30, 1955 Remanding Case for a Further Hearing

NOONAN, *D.J.*:

The petitioner in this action seeks by this motion to stay his deportation until the court has decided his case on the merits, and the government has cross-moved to dismiss the petitioner's petition on the ground that the petition fails to state a claim upon which relief may be granted. In

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view of the papers filed herein extraneous to the pleadings, this motion is treated as one for summary judgment.

If the government's motion should be denied, the petitioner's motion should be granted; and if the government's motion should be granted the petitioner's motion will become moot. Since the basic facts are not in dispute, this case is amenable to disposition by summary judgment.

We turn therefore to the merits of the government's motion and hence to those of the petition as finally amended.

The petitioner herein seeks judicial relief by way of a review of immigration proceedings, a temporary injunction and certain other relief. One of the proceedings has resulted in an administrative decision to deny suspension of deportation, which decision was based on a conclusion that the petitioner is not a person who, on deportation, would be subject in the country to which he is to be deported, to physical persecution [8 U. S. C. Section 1253 (h)]; the other administrative proceeding has resulted in a determination denying the adjustment of the petitioner's immigration status, which adjustment may be based on the ground of fear of persecution if the alien is forced to return to the country of his nationality and if the alien is otherwise qualified. [50 U. S. C. App. Section 1971 (d)].

The petitioner contends that he was denied procedural due process in each of these two administrative determina-

tions because of the use of certain confidential and secret

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information not known to the petitioner, and, he asserts because the determination was not based on "reasonable, substantial and probative evidence."

Furthermore in the latter administrative proceeding, the petitioner asserts that the agency improperly and unconstitutionally applied to the petitioner herein the restrictions specified in section 1182 (a) (27) of Title 8, U. S. Code.

The petitioner is a native and citizen of China who entered this country legally as a non-immigrant in 1939 as a member of the family of a duly accredited Chinese diplomat. As such, the petitioner's status was dependent upon the continuance of his father's status.

In 1946, the father's status terminated and he (the father) returned to the Chinese mainland with the rest of his family, not including the petitioner who decided to remain here. From that time on, his (the petitioner's) status has been that of an alien unlawfully in this country and subject to deportation.

Upon the commencement of deportation proceedings against him, the petitioner applied for discretionary relief from deportation pursuant to the provisions of what was then 8 U. S. C. Section 155 (c), which provisions are now largely covered by 8 U. S. C., Section 1254 (a) (1). The relief sought at that time was either suspension of deportation or voluntary departure, and, after a hearing, both were denied and deportation ordered by the hearing officer in his decision dated December 14, 1952. From this decision

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and order, the petitioner did not appeal administratively.

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Following the above decision and order, and the issuance of a warrant of arrest for purposes of deportation, the petitioner applied for discretionary relief pursuant to the provisions of Section 6 of the Refugee Relief Act on the ground of fear of persecution if deported to China. [50 U. S. C. App. Sec. 1971 (d)].

He also applied for a stay of deportation pursuant to the provisions of section 243 (h) of the Immigration and Nationality Act of 1952 [8 U. S. C. Section 1253 (h)] on the ground that he would be subject to physical persecution if deported to China.

After hearings on these questions in both of these last two administrative proceedings, the Immigration and Naturalization Service of the Department of Justice, basing its decision in part upon "confidential and secret information" not disclosed to the petitioner, denied his applications.

There is no question that the relief sought was purely discretionary, and the petitioner cannot hope to succeed without establishing either a clear abuse or an absence of discretion (*U. S. ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489). He asserts that the use of "confidential and secret" information in the proceeding, and/or the application to him of the standards set out in 8 U. S. C. Section 1182 (a) (27) indicate such an abuse of, or failure to use, discretion. This, then, is the ultimate issue for determination.

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In determining this question, we look first to the right of an alien facing deportation to procedural due process.

That a resident alien has a right to procedural due process is firmly established (*Kwong Hai Chew* v. *Colding*, 344 U. S. 590). A leading case on this subject is *Shaughnessy* v. *Mezei*, 345 U. S. 206, decided March 16, 1953, in which

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Mr. Justice Clark, in delivering the opinion of the court, upheld the right of the Attorney General to exclude "on the basis of information of a confidential nature" a resident alien of the United States who had left this country to travel abroad. In so holding, however, the opinion distinguished between an alien being excluded and one being deported. The first sentences on page 212 read as follows:

> "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. • • • (citing cases) • • • But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned'."

Thus the question is narrowed by virtue of the fact that the petitioner herein is a resident alien being deported rather than excluded.

In considering the propriety of using "secret and confidential" information against a resident alien in a deportation proceeding, we cannot ignore the case of *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392. In that case, the United States Court of Appeals for this circuit specifically stated (p. 394):

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> "• • • we think it clear that use by the Commissioner of confidential information undisclosed to the appellant would not be in violation of procedural due process."

Thus, as to the petitioner's objection to the use of such information in his hearing pursuant to Section 243 (h) of

the Immigration and Nationality Act, the Dolenz case presents an insurmountable barrier to his success.

The hearing under Section 6 of the Refugee Relief Act, presents a different statutory problem. In this proceeding it is the alien's burden to establish that he is unable to return to the country of his nationality because of fear of persecution. And, unlike the provisions of the Immigration and Nationality Act in which it is the "opinion" of the Attorney General that determines the alien's future, this Act requires that the fear of persecution being established, the Attorney General, "upon consideration of all the facts and circumstances of the case", is to determine whether the alien is barred by any non-quota provision of the Immigration and Nationality Act.

The wording of the administrative decision in the Section 6 proceeding denies the petitioner's application not on the ground that he has no legitimate fear of persecution, but rather on the ground that he is not otherwise eligible according to the provisions of the Immigration and Nationality Act, and indicates that the secret and confidential information used did not go toward the decision on the question of fear of persecution, but rather that it affected that part of the proceeding referring to the provisions of

the Immigration and Nationality Act.

In view of the fact that the Attorney General is required by the Refugee Relief Act to make a determination based on all of the pertinent facts and circumstances, rather than merely to exercise his opinion on the matter, Congress must have intended that the alien should be informed of the nature of the information being used against him so that he might attempt to rebut it. How can a true deter-

mination be made without the issues being clear to both parties?

The government makes much of the change in the wording of the Immigration and Nationality Act which makes the administrative relief contingent on the *opinion* of the Attorney General. Such being the case, the subsequent wording of the Refugee Relief Act requiring the Attorney General's *determination* should be equally significant.

Accordingly, therefore, it is the opinion of this court that the petitioner herein was denied due process of law in the hearing held pursuant to the provisions of the Refugee Relief Act of 1953 as amended by reason of his not being informed of the nature of the confidential information against him.

Therefore, his petition does state a claim upon which relief can and should be granted.

Turning now to the constitutionality of applying to the petitioner in a Refugee Relief Act proceeding the restrictive provisions of Title 8 U. S. C. Section 1182 (a) (27) which, it is clear, were incorporated by the hearing officer,

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we note that this section specifies certain excludable classes of aliens. Petitioner argues that the phrase "prejudicial to the public interest" is too vague and indefinite to be validly applied to a resident alien.

Although a resident alien may have more procedural rights than an alien seeking entry, the standards of fitness set by Congress regarding fitness to remain in this country need not be different. We do not find the wording "public interest" to be so vague and indefinite as to be unconstitutional as applicable to this case.

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Accordingly, this court is disposed to grant the following relief to the petitioner:

(1) The petitioner's application for relief under the terms of the Refugee Relief Act is remanded to the appropriate hearing officer in the Immigration and Naturalization Service for a hearing consistent with the ruling of this court that the petitioner is entitled to know the broad nature of the "secret and confidential" information being used against him;

(2) The petitioner's request for a temporary injunction is granted, enjoining the respondent herein from executing the outstanding order of deportation pending the final decision on the rehearing referred to in the preceding section; and

(3) The previous decisions of the Immigration and Naturalization Service officials based on the use of secret and confidential information on the Refugee Relief Act pro-

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ceeding are declared null and void.

Settle an order in accordance with the above opinion.

Dated, New York, N. Y.
September 30, 1955

GREGORY F. NOONAN
U.S.D.J.

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Order of December 2, 1955 Remanding Case

The plaintiff-petitioner above-named having, by notice of motion dated July 1, 1955, moved this Court for an order staying the enforcement of an order of deportation outstanding against said plaintiff-petitioner, pending the hearing and determination of the above-entitled action, and the defendant-respondent having, by notice of motion bearing the filing date of August 25, 1955, cross-moved to dismiss the petition on the merits, and said motions having duly come on to be heard before this Court on September 6, 1955, and counsel having been heard, and due deliberation having been had thereon, and the Court having thereafter, on October 4, 1955, filed its opinion dated September 30, 1955, it is now, on motion of Stanley Law Sabel, Esq., attorney for plaintiff-petitioner,

ORDERED, that the motion by the defendant-respondent to dismiss the complaint be, and hereby is, denied; and it is

FURTHER ORDERED, that the plaintiff-petitioner's motion for a temporary injunction restraining the defendant from deporting plaintiff or taking him into custody for deportation, pending the final disposition of this suit, be, and hereby

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is, granted; and it is

FURTHER ORDERED, that the plaintiff-petitioner's application for relief under the terms of the Refugee Relief Act be, and hereby is, remanded to an appropriate Hearing Officer in the Immigration and Naturalization Service for a hearing consistent with the rulings and instructions of this Court as contained in its opinion dated September 30, 1955, and filed October 4, 1955; and it is

Order of December 2, 1955 Remanding Case

FURTHER ORDERED, that pending such hearing and the determination thereof, and a filing in this Court of a report of such determination, jurisdiction of the petition in this case is retained by this Court, and the plaintiff-petitioner may, if so advised, file such supplemental and amended pleadings as are necessary for a review of the aforesaid determination, within twenty days from the date such determination is made; and it is

FURTHER ORDERED, that the time within which the defendant-respondent may answer, or make further motions regarding, the petition be, and hereby is, extended for a period of twenty days from the date of the aforementioned determination of plaintiff-petitioner's administrative rehearing under the Refugee Relief Act; or if a supplemental or amended pleading is filed by plaintiff-petitioner, for a period of twenty days from the service of such supplemental

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or amended pleading.

Dated: New York, N. Y., December 2, 1955.

GREGORY F. NOONAN
United States District Judge

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Opinion of October 23, 1956, Granting Appellee's Motion for Summary Judgment

McGOHEY, *D.J.*:

The petitioner is a deportable alien who sought adjustment of his status under Sec. 6 of the Refugee Relief Act of 1953,[1] on the claim that if returned to China he would be subjected to persecution. The Attorney General determined that the petitioner failed to establish his claim and denied adjustment of his status. The petitioner now seeks to have the Attorney General's determination set aside on the ground that it lacks support in the evidence on which it purports to be based and is arbitrary.

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The Government moves for a summary judgment.

In a similar proceeding brought by the petitioner in September 1955, he raised the same issues now presented and others. The latter were decided against him by Judge Noonan and are not before me. Judge Noonan held that, on the alien's claim for adjustment of his status on the ground of possible persecution if returned to China, procedural due process required that he be informed of the nature of the "secret and confidential" information which was used so that he might have the opportunity to rebut it. It was conceded that he had then not been so informed. Judge Noonan stayed his deportation and remanded the petitioner's application for adjustment of status pursuant to Sec. 6 of the Refugee Relief Act, "to the appropriate hearing officer . . . for a hearing consistent with the ruling of this court that the petitioner is entitled to know the broad nature of the 'secret and confidential' information being used against him."

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1 50 U. S. C. A. App. 1971 (d).

Opinion of October 23, 1956, Granting Appellee's Motion for Summary Judgment

In obedience to that direction, the petitioner was accorded a second hearing on March 27th, 1956 by a Special Inquiry Officer of the Immigration and Naturalization Service. The petitioner was accompanied by his counsel. The broad nature and the purport of the secret and confidential information were disclosed by the examiner under six categories. Petitioner's counsel then examined him in detail and the petitioner denied the matters in each specification. He admitted that he had favored the Communist regime

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when it first assumed power in China, but asserted that he had later come to disapprove of it. He asserted that he does not "agree with Communism in principle;" that he fears persecution and imprisonment if he is returned to China because it would mean "doing exactly what is assigned to me"; that he could not work for the Chinese Communist Government as a professional entertainer (he is a dancer) because he doesn't "believe in the goals, the exhortation (sic) of the Communist Government"; and that "as a cultural worker more than as a technician I can only work if I believe in what I am doing."

In an opinion dated April 10th, 1956, which was approved by the Acting Regional Commissioner on May 9th, 1956, the Special Inquiry Officer concluded and recommended as follows:

> "Despite the applicant's categorical denial of the allegations contained in the confidential and secret information, the broad and general nature of which was disclosed to the applicant, it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution upon his return to China,

and his application for adjustment of status should be denied on that ground.

> "Recommendation: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that the applicant has not established that he has reasonable grounds to fear persecution upon his return to China because of his 'political opinion.'"

The Attorney General, on the basis of the foregoing, denied the petitioner's application for adjustment of his immigra-

tion status. The petitioner concedes that he has the burden of establishing that he has reasonable grounds to fear persecution because of his political beliefs if he is returned to China. His contention here is that he has sustained that burden; and that the Attorney General's contrary determination lacks sufficient and indeed any support in the evidence on which it purports to be based.

I do not agree. Congress has vested the Attorney General with wide discretion in immigration matters and "the scope of judicial review is clearly circumscribed."[2] Indeed, "the very nature of the decision (the Attorney General) must make concerning what a foreign country is likely to do is a political issue into which the courts should

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[2] *U. S. ex rel. Moon* v. *Shaughnessy*, 2C. 218 F. 2d 316-318.

Opinion of October 23, 1956, Granting Appellee's Motion for Summary Judgment

not intrude."[3] To be sure, the Attorney General may not capriciously disregard the evidence consisting of the petitioner's denials or draw irrational inferences from such evidence. But, neither is he obliged to accept those mere denials at full value when they conflict with other evidence. Questions of weight and credibility were for the Attorney General, not this Court, to pass on. See *U. S. ex rel. Femina* v. *Curran.*[4] On this record it cannot be said that he acted capriciously, arbitrarily or unfairly in concluding that the petitioner has failed to sustain his burden of estab-

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lishing reasonable grounds for his asserted fear of persecution if returned to China.

Accordingly the petition will be denied and the motion for summary judgment be granted.

Settle order.

JOHN F. X. MCGOHEY
U.S.D.J.

Dated: New York, New York. October 23rd, 1956

3 *U. S. ex rel. Dolenz* v. *Shaughnessy*, 2C. 206 F. 2d 392-395.

4 2C. 12 F. 2d 639, 640.

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Order of November 7, 1956 Granting Summary Judgment

This cause having come on to be heard on the defendant-respondent's motion for summary judgment and the opinion of the Court granting the motion having been filed on October 23, 1956, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant-respondent's motion for summary judgment be and the same hereby is granted and the petition be and the same hereby is denied.

Dated: November 7, 1956

JOHN F. X. MCGOHEY
U.S.D.J.

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Decision of Special Inquiry Officer

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No: A 7 037 142

Serial number: 3480

NO APPEAL
New York, N.Y.

APR 10 1956

In re: CHI CHAO LI or
CHI CH'AO-PIEH

PROCEEDINGS UNDER SECTION 6 OF THE REFUGEE RELIEF ACT OF 1953

IN BEHALF OF APPLICANT: Marvin Neuman, Esq.
1776 Broadway
New York, New York

APPLICATION: Adjustment of immigration status

The applicant is a 29 year old single male alien, a native and citizen of China. He last entered the United States on February 3, 1939 at the port of New York aboard the Steamship Aquitania at which time he was admitted under Section 3(1) of the Immigration Act of 1924 as a member of the immediate family of an accredited government official. The applicant has testified that he is unable to return to China, which is the country of his birth, nationality and last residence because of a fear of persecution, that country being Communist dominated.

On June 16, 1955 the Acting Regional Commissioner at Burlington, Vermont approved a recommendation of the Special Inquiry Officer that the application for adjustment of status be denied on the ground that the applicant

was presently inadmissible to the United States under the provisions of Section 212(a)(27) of the Immigration and Nationality Act and thereby ineligible for adjustment of status pursuant to Section 6 of the Refugee Relief Act. In an action for review of the proceedings and summary judgment in the United States District Court for the Southern District of New York, the Court, on December 2, 1955 ordered the case remanded to a hearing officer of the Immigration and Naturalization Service and declared that the conclusion holding the applicant inadmissible to the United States under Section 212(a)(27) of the Immigration and Nationality Act where such conclusion was based on confidential and secret information not disclosed to the applicant, was improper. The applicant was reexamined on March 27, 1956 at which time as ordered by the United States District Court the broad nature of the allegations contained in the confidential and secret information

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concerning the applicant were disclosed to him. The applicant thereupon made a categorical denial of each and all such allegations which indicate that he is in sympathy with the Communist movement of China; that he has approved certain programs of the de facto Communist government of China; that members of his immediate family are in accord with or actively participating in the Communist movement in China or that the applicant has participated in activities since his entry into the United States which were in sympathy with such Communist movement in China. The applicant did however admit that during the early days of the Communist regime in China, he was in sympathy with that movement believing that the movement was for the betterment of the average Chinese people. He now states that because of subsequent events, he has changed

his mind and has become anti-Communist in political opinion.

Despite the applicant's categorical denial of the allegations contained in the confidential and secret information, the broad and general nature of which was disclosed to the applicant, it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution because of his political opinion should he return to China, and his application for adjustment of status should be denied on that ground.

RECOMMENDATION: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that the applicant has not established that he has reasonable grounds to fear persecution upon his return to China because of his political opinion.

(Signed) LENNOX F. KANZLER
Lennox F. Kanzler
Special Inquiry Officer

LFK:mn

Upon consideration of the entire record, including the exceptions filed, we find that the exceptions are without merit and that the application should be denied.

SO ORDERED

(Signed) LELAND W. WILLIAMS
Acting Regional Commissioner

May 9 1956

Hearing Before Special Inquiry Officer on March 27, 1956

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

SWORN STATEMENT

In Proceedings under Section 6
of the Refugee Relief Act of 1953
in the case of

CH'AO LI CHI
a/k/a CH'AO PIEH CHI

Applicant

File: A-7 037 142

Serial: 003480

Special Inquiry Officer: Lennox F. Kanzler

Stenographer: Elsa B. Tauriello

Language: English

Date: March 27, 1956

Place: 70 Columbus Avenue
New York, New York

Counsel: Marvin Neuman, Esq.
1776 Broadway
New York, New York

Special Inquiry Officer to Applicant:

Q. Do you speak and understand the English language?
A. Yes, I do.

Examination of Chi Ch'ao Li

Q. What is your full, true and correct name? A. CH'AO LI CHI.

Q. Which of these is your family name? A. CHI.

Q. Then according to Chinese custom would your name be CHI CH'AO LI? A. That is correct.

Q. What is your present residence address? A. 225 East 10th Street, New York 3, N. Y.

Q. Are you the same Chi Ch'ao Li or Chi Ch'ao-Pieh who was examined before me in this office on May 5, 1955 on your application for adjustment of status under Section 6 of the Refugee Relief Act of 1953? A. Yes, I am.

Q. Your case has again been referred to me for further hearing on the basis of an order entered on December 2, 1955 by a United States District Judge, the Southern District of New York, which order of the court, together with the

opinion of the court dated September 30, 1955, I will mark as an exhibit and attach to the record in this case. You have been called into this office today for that purpose. Do you understand? A. Yes, I do.

Special Inquiry Officer to Counsel: Mr. Neuman, as I understand it, you are now counsel of record in this case. Is that correct?

By Counsel: Yes, sir.

By Special Inquiry Officer: Are you ready to proceed with this hearing?

By Counsel: Yes, sir.

Special Inquiry Officer to Applicant:

Q. Will you now stand and raise your right hand. Do you solemnly swear that all of the evidence you are about to give in this case will be the truth, the whole truth and nothing but the truth so help you God? A. I do.

Examination of Chi Ch'ao Li

By Special Inquiry Officer: Sit down, please.

Special Inquiry Officer to Counsel: Now, Mr. Neuman, would you like to proceed with any presentation of evidence or interrogation of this applicant in support of his application?

By Counsel: Yes, sir. But before doing so may I ask whether this is a hearing de novo conducted under the auspices of the District Court of the United States or what is the general nature of these proceedings?

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By Special Inquiry Officer: This is not a hearing within the definition of what we normally consider a hearing to be in deportation proceedings. The regulations provide that an applicant for adjustment of status under Section 6 of the Refugee Relief Act of 1953 shall be examined on his application. This was done by me on May 5, 1955. At that time a sworn statement of this applicant in support of his application was made, at which time I propounded certain questions to which the applicant under oath responded. A record of that sworn testimony was also attached to his application as EXHIBIT U. I believe you have a copy of that record in front of you. We are today proceeding on order of the Southern District Court of New York and I note in the court's order the case is remanded to an appropriate hearing officer for a hearing consistent with the rulings and instructions of the court's opinion dated September 30, 1955. I cannot, of course, concede that the court has reference to any hearing not in conformity with the regulations promulgated under the Refugee Relief Act of 1953 and, accordingly, we will proceed with the taking of this testimony,

the record of which will be made a part of this record as an exhibit.

By Counsel: Mr. Kanzler, is it your intention to divulge to the applicant the broad nature of the secret and confidential information being used against him, and I am now quoting from the opinion of his Honor, Judge Noonan, which appears on page #8 of said opinion dated September 30, 1955?

By Special Inquiry Officer: Yes. The broad nature of the adverse information in the possession of this Service and which is classified as restricted or secret not only can be but, in my opinion, has been revealed to this applicant at the time of his examination on May 5, 1955. The specific information classified as confidential or secret cannot be disclosed to the applicant or to any other person by me. As to the broad nature of such information, you certainly will be apprized of it and given an opportunity to defend against it or to offer any material evidence refuting it.

By Counsel: May I ask for the divulgence at this time of the information which you contemplate furnishing.

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By Special Inquiry Officer: First, it is indicated that this applicant is not as anti-communistic in political opinion as would appear from his application for adjustment of status because of his very close relationship with his half-brother, Chi Chao Ting, who in the past is reported as having been active in the communist cause. Also, because of his close relationship with his father, Mr. K. C. Chi, who, it is reported, was a former editor of the China Daily News published in the city of New York,

Examination of Chi Ch'ao Li

which paper is popularly known as the Chinese communist publication in New York City, and who is reported to have returned to the mainland of China to accept a post at Peiping University under the sponsorship of the Chinese People's Republic.

Secondly, because of this applicant's own testimony to the effect that in the early days of the communist coup in China he was favorably impressed with such activity.

Third, because of his reported activity in behalf of the Chinese Students Christian Association which in 1949 was reported to have been led by pro-communist persons, at which time the applicant is reported to have upheld communism as being better than the capitalist system.

Fourth, the applicant's reported participation in a communist inspired brotherhood festival conducted at the People's Drama Theatre, 812 Eldridge Street, New York, at three p.m. Sunday afternoon, February 11, 1951.

Fifth, the applicant's close association with persons other than his immediate family reported to be active in communist activities in the United States, specifically, one Kee Min Ta.

Sixth, the applicant's reported membership in the American Youth for Democracy, an organization also reported as active in communist affairs.

This generally is the broad nature of the secret and confidential information concerning this applicant. Do you now wish to proceed?

By Counsel: Mr. Kanzler, may I say that your statement of the broad nature of the information being used against the applicant appears by innuendo in the preceding sworn statement taken of him on

May 5, 1955 which has already been made a part of the record. In other words, we have not been furnished with any information today different than

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what is contained in that testimony. Therefore, may I ask you to define some of the accusations, and I will be specific in my request.

I would like to know the evidence upon which lies the basis of the charge of a "very close relationship with his half-brother." I believe that Mr. Chi is entitled to know the evidence on which the charge is made that his father returned to China to accept a post under the sponsorship of the Chinese People's Republic. I would like to know what his reported activities in behalf of the Chinese Students Christian Association consisted of and, if possible, the name of the informant. I would like to know the time and the place and the occasion in which the applicant is reported to have upheld communism as being better than the capitalist system. I would like to know the nature of the information concerning the applicant's close relationship with Kee Min Ta and the basis for the report that said Kee Min Ta was active in communist activities in the United States. And, finally, the basis of the reported membership in the American Youth for Democracy.

My questions actually amount to my asking for an offer or proof in this matter or for my asking whether the government intends to introduce any probative evidence in support of these various charges.

By Special Inquiry Officer: Except for my prior statement outlining the broad nature of the information contained in the confidential reports, I am not

permitted to disclose anything further, specifically as to the nature of the evidence. Nor does the government intend to offer any additional evidence in this matter.

By Counsel: Before proceeding, Mr. Kanzler, may I ask whether this will be a hearing de novo or whether this will be considered as an application de novo to be heard on its merits.

By Special Inquiry Officer: I think I previously answered that by telling you that this is not a proceeding de novo. I construe the order of the United States District Court to be permitting this applicant a furtherance of the proceedings arising under Section 6 of the Refugee Relief Act. I have disclosed to him the broad nature of the information which may be considered derogatory and I now afford him an opportunity to offer any material evidence in support of his application or to refute any of the information or allegations previously referred to.

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By Counsel: Do I understand then that the government does not intend to introduce any witnesses or any evidence whatsoever at this time?

By Special Inquiry Officer: That is correct.

Counsel to Applicant:

Q. Mr. Chi, you have heard the hearing officer give the broad outlines of the information which is contained in their secret and confidential file. Before proceeding with the merit of your application, I would like to examine you in detail upon each of these allegations. First, you seem to be charged with a very close relationship with a half-brother of yours, Chi Chao-ting. How much of an age

differer ? is there between you and this half-brother? A. He is 24 years older than I and he left China before I was born.

Q. How old are you now? A. I am now 28.

Q. In the 28 years of your life, how much time would you estimate that you were physically resident with your half-brother, sharing a common roof? A. I cannot say exactly, but the only definite period that we shared anything like a common roof was while we were coming from China to this country, en route.

Q. Was there any period of time amounting to three months or more from the time that you reached the age of fifteen to the present that you did share living quarters with your brother? A. No. At no time.

Q. From the age of fifteen to the present time, almost thirteen years, you have never spent as much as three months in the same household with your half-brother? A. I would push the age back further. From the time we arrived in this country to the present, I have never done that.

Q. Remember that it has been reported that you enjoy a very close relationship with your half-brother. Would you say that your relationship with him was a very close one? A. I would not say so.

Q. Is your brother a member of a communist party anywhere in the world? A. So I understand.

Q. Did your half brother ever attempt to influence your political thinking? A. I was too young when I was with him at all and later on I very rarely saw him.

Q. When was the last time that you actually saw him face to face? A. When he came to this country with Dr. H. H. Kung to the Breton Woods Conference.

Q. Was your half-brother then a communist or was he then an official of the Chinese Nationalist Government?

A. He was then an official of the Chinese Nationalist Government.

Q. Do you have any knowledge as to when your half-brother became a communist? A. That I have no definite knowledge. I understand, from what I have been told, that he has been active a long time ago, of which I would have no knowledge.

Q. Were any of your half-brother's friends also your friends or associates? A. No, because they all belonged to the older generation.

Q. Would you say that there is any basis in fact for an accusation that you had or have a very close relationship with your half-brother? A. No, except for the accident of family relationship.

Q. The charge was also made that you enjoy a very close relationship with your father, Mr. K. C. Chi. You did share the same roof with your father, did you not? A. Yes, and we shared many other things.

Q. From when to when did you live with your father? A. From, well, I have lived with him all the time up till the time he went back to China.

Q. When was that? A. In 1946.

Q. That was more than two years before the Chinese communist taking of power? A. Yes.

Q. Up to 1946, did your father express any political opin-

ions to you? A. Yes. He was actively pro-President Roosevelt and when I said before that we have shared many things together, I mean such things as study of the old Chinese classics and also some translation work, of which included our complete collection of the speeches of Roosevelt.

Q. The Chinese communist movement got under way in

China some time early in 1920, did it not? A. So I understand.

Q. And the Chinese communists broke with the Chinese Nationalists in 1927. Is that information correct? A. I don't really know much about it.

Q. Referring to the period of time from 1927 to 1946, when the Chinese communist armies were isolated in the northwest regions of China, did your father express any pro-communist views to you? A. The early period I would not know since I was born only in 1927 and for as long as I can remember until 1946 my father was a member of the Chinese Nationalist Party and was an official of the Nationalist Government.

Q. When your father returned to China in 1946, did he return as an official of the Chinese Nationalist Government? A. As I recall the situation, his official capacity had terminated as a special investigator of American legal systems or something like that. He went back in 1946 when Dr. Hu Shih, who was the former Ambassador to the United States under the Nationalist Government, was the president of Peking University, and it was at Dr. Hu Shih's invitation that my father went back to Peking University.

Q. At that time Peking University was being operated under the auspices of the Chinese Nationalist Government? A. Yes.

Q. Not the Chinese Communist Government. A. Yes.

Q. And your father returned to a post under the Chinese Nationalist Government. Is that correct? A. That is correct.

Q. I believe you have testified before that your father continued as a teacher at Peking University until a year or so after the Chinese communist armies overran Peiping. Is that right? A. Yes, that is correct.

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Q. When was the last time you received a letter from your father? A. I have received no communication from him since the occupation, since the change.

Q. You have received no letter from your father since 1948 or 1949? A. That is true. I have received letters from my mother but not from him.

Q. Have any of the letters from your mother mentioned your father's occupation or profession or residence or any other details? A. No. Merely said, "Your father is well."

Q. Do you know of your own knowledge whether your father is presently teaching at Peking University? A. No. He is no longer.

Q. I believe that you have been told that your father is still teaching at Peking University. A. I think the information is just that the case has gone on so long. The information is outdated.

Q. You do not believe that your father is now teaching at Peking University? A. No, because it is from mother's letters. I don't remember which year, but he has retired.

Q. Would your mother's letter indicate to you whether your father's retirement had been voluntary or involuntary? A. No. I would not know.

Q. What subject did your father teach at Peking University? A. He taught law and logic.

Q. The hearing officer advised you that your father is reported to have returned in 1946 to Peiping, China, "to accept a post under the sponsorship of the Chinese People's Republic." Would you say that that information or that report is correct or incorrect? A. That statement is not correct.

Q. Why would you say the statement is not correct? A. Because when he went back to China in 1946, it was not to

accept a post under the sponsorship of the Chinese People's Republic.

Q. It was, rather, to accept a post under the sponsorship of the Chinese Nationalist Government, was it not? A. And at the specific invitation of Dr. Hu Shih.

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Q. And has there ever been any indication that Dr. Hu Shih is pro-communist? A. No.

Q. Has your father given any indication that he is pro-communist? A. He has never given expression.

Q. The only way in which it could be said that your father is pro-communist is by reason of his having continued his profession as a teacher at the Peking College after its occupation by the Chinese communists? A. No. The other reason is that he was the first editor of the Chinese Daily News.

Q. When you say that your father was the first editor of the Chinese Daily News, to what year of editorship are you referring? A. It was the year 1940. He was invited by group of young Chinese to assume the editorship of the China Daily News as a senior scholar.

Q. The China Daily News is today known as a pro-communist newspaper, is it not? A. Yes, it is.

Q. In 1940, when your father took over the editorship, did it then express any pro-communist views, to the best of your knowledge? A. No.

Q. When you say that your father was a senior scholar, what do you mean, with particular reference to his work as editor of the China Daily News? A. Since the China Daily News is a Chinese language newspaper and the young Chinese are weak in that linguistic scholarship in the Chinese language, he literally edited manuscripts.

Q. Did your father write any news reports himself? Did he write any editorials himself? Did he do any creative

work with that newspaper or was he the editor in the technical sense of the term?

Special Inquiry Officer to Applicant: Before you answer that question, I want to advise you that your answer should be based on actual knowledge that you have of the subject:

By Applicant:

A. Then I say I don't know. At the time I was twelve.

Counsel to Applicant:

Q. In 1940 your father was an officer of the Chinese Nationalist Government as well as editor of the China Daily News. A. That is true.

Q. Were those two professions consistent or inconsistent, if you know? A. That is inconsistent.

Q. How long did your father continue to be editor of the China Daily News? A. Until he entered the Office of War Information in 1941 after Pearl Harbor.

Q. In other words, your father was associated with the China Daily News for just about a year or a little more than a year? A. Yes.

Q. Did he then sever his connection with that newspaper? A. Yes.

Q. He did no further work for the newspaper? A. Yes.

Q. If the China Daily News had been pro-communist as late as 1946 and if your father had been identified with that newspaper to that date, would your father have been invited by Dr. Hu Shih to teach at Peking University? A. No, he would not.

Q. Mr. Chi, I show you what appears to be a newspaper folded in an original mailing jacket and ask if you can iden-

tify this. A. Yes. It is a copy of the China Daily News addressed to Mr. K. C. Chi, who is my father, at my present address which was the family address.

Q. Your father lived at this address also before his departure for China? A. Yes.

Q. When did you receive this particular newspaper? A. I continue to receive it.

Q. You still receive this newspaper? A. Yes.

Q. Why do they continue to send this newspaper to you? A. It is not sent to me. It is sent to my father and father

had a life subscription by reason of his having been the first editor.

Q. Do you read this newspaper? A. No.

Q. What do you do with these issues which come to you? A. I dispose of them.

By Counsel: Mr. Hearing Officer, May I offer this newspaper for inclusion in the record, together with this mailing jacket.

Special Inquiry Officer to Counsel: At this point I'd like to advise you, Mr. Neuman, that the order of the court and the court's opinion were combined in evidence as Exhibit V in this proceeding; and this newspaper, together with its mailing jacket, is now identified as Exhibit W.

Counsel to Applicant:

Q. Mr. Chi, you have also been informed that your own testimony is to the effect that in the early days of the communist coup in China you were favorably impressed by that activity. Do you remember being charged with that? A. Yes, I do.

Examination of Chi Ch'ao Li

Q. I would like to discuss with you the early days of the Chinese coup and what it meant to you. The Chinese coup occurred during 1948 and was consolidated in 1949. Were you at that time in contact with other Chinese people? A. In 1948 and 1949? No, I was not.

Q. You read news dispatches of those years, did you not? A. Yes.

Q. News dispatches concerning the goings on in the mainland of China? A. Yes.

Q. What was your feeling about what was happening there? A. I was pleased with the land reforms which were professed.

Q. Were there other Chinese of your family background and social and economic background with whom you sometimes discussed the happenings in China? A. In 1948 I did not know any other Chinese.

Q. What about 1949 and 1950? A. In 1949 and 1950 Mr. Kee Min Ta became my roommate. That was in 1950.

Q. What was the general feeling of the Chinese in the United States about the happenings in China, if you remember? A. I don't remember because, except for Kee Min Ta who became my roommate, I have never associated with any Chinese ever since I have been in this country.

Q. Is it true that you were disaffected by the behavior of the Chinese Nationalist Government officers and other civilian employees of that government? A. I was dissatisfied with the Chiang Kai-shek rule at the time simply from what I hear in non-Chinese circles.

Q. What displeased you about Chiang Kai-shek's rule? A. About the corruption.

Q. Are you familiar with the Department of State white paper which gave the United States analysis of the regime of Chiang Kai-shek and which pointed out the differences

between Chiang Kai-shek's government and that of the Chinese communist government? A. Yes, I am familiar with that report.

Q. What did that report detail in so far as Chiang Kai-shek is concerned? A. Chiang Kai-shek's government was incompetent and corrupt.

Q. Did you believe what you read in the State Department white paper? A. Yes, I did.

Q. Was this one of the primary moving forces that created your impression and opinions? A. Yes.

Q. Did you have any personal knowledge of the bribery and corruption and graft and inefficiency of the Chiang Kai-shek government? A. No.

Q. But you were disaffected because of what you had read about them? A. Yes.

Q. Do you know whether the Chinese people living in the United States welcomed the Chinese communist government simply and solely because it was a change from the Nationalist government? A. I don't know for a fact because I have little contact with Chinese.

Q. Did you get any kind of an impression from your non-Chinese friends in this particular area? A. Yes.

Q. What impression did you gain from your conversations with your non-Chinese friends? A. The impression is that the change is a relief.

Q. Would any kind of a change have been a relief to the Chinese people? A. Yes.

Q. Do you still feel the same way about the change? A. No.

Q. Why not? A. Because the original promise turned out to be not what they had appeared.

Q. You mean that the promises which they had made were not fulfilled by the Chinese communist government? A.

Not only that but have turned into things which are much worse. Turned into terrorism and compulsion and regimentation.

Q. I call your attention to the front cover of Time Magazine for March 5, 1956 and to the story covering that edition beginning on page #27, and I ask if you have read this entire dispatch concerning Communist China. A. I have.

Q. Does the information contained herein come to you as any surprise or has this been actually occurring in your knowledge? A. It concerns my fears.

By Counsel: Mr. Hearing Officer, may I ask that this issue of Time Magazine be made a part of the record as an exhibit.

Special Inquiry Officer to Counsel: Mr. Neuman, the issue of Time Magazine presented by you is marked in evidence as Exhibit X.

Will you proceed.

Counsel to Applicant:

Q. In 1948 or 1949 or 1950, did you have any knowledge

of the terror as is set forth in the magazine which has just been marked Exhibit X? A. None.

Q. Does this article express your own repugnance and fear of such terror? A. Yes, it does.

Q. Mr. Chi, I would like to proceed to the third charge against you, namely, your reported activity in behalf of the Chinese Students Christian Association. Were you a member of that organization and if so, for how long and where? A. No. I was not a member of the association.

Q. Were you ever at any time a member of that organization? A. No, I was not.

Examination of Chi Ch'ao Li

Q. Did you ever at any time pay any dues to that organization? A. No, I have not.

Q. Have you ever given any performance under the auspices of that organization? A. I have danced with Kee Min Ta at a few functions but I would not know who they were for.

Q. To the best of your knowledge, you have never performed for this Chinese Students Christian Association? A. No.

Q. Do you have any information as to why you are "reported" to have been active in behalf of the Chinese Students Christian Association? A. It is possible that my younger brother was a member. I say it is possible because at that time he was away from home going to Harvard and I was not familiar with all his activities but he may have been active in the organization and his name would very easily be confused with mine.

Q. What is your younger brother's name? A. Chao-Chu Chi.

Q. Are there any phonetic readings of your brother's name which would make it similar to yours? A. His friends would often refer to him as Chao Chi.

Q. Were you ever referred to by the name of Chao Chi? A. Yes, also.

Q. How did you and your brother keep one another separated? A. When he is at home and I am at home, we ask, "Which one do you mean?"

Q. By the way, in 1949 were you at school or were you otherwise occupied? A. I cannot recall exactly at present. I believe I was full time at the New York University Summer School, which I could check with the attendance record there.

Q. You were informed that it was reported that you up-

held communism as being better than the capitalist system. Is that report true or untrue? A. It is untrue.

Q. Did you ever make any statement at any time at any place to any person in which you upheld communism as being better than the capitalist system? A. No.

Q. If there is such a report, could that report refer to you? A. No, it could not.

Q. Is it possible for the report to have referred to someone of a similar name? A. That is possible.

Q. There is no truth whatsoever in the remark that it is reported that you upheld communism as being better than the capitalist system? A. There is no truth.

Q. Do you believe at the present time that communism is better than capitalism? A. I do not.

Q. Have you ever believed that? A. No.

Q. And you have never voiced any such sentiment? A. No, I have not.

Q. Mr. Chi, the fourth allegation is your reported participation in a brotherhood festival. What brotherhood festival does this concern? A. I believe that it is a true reporting of fact. I did dance at the place.

Q. When you say "place" you mean the People's Drama Theatre, 812 Eldridge Street, New York City? A. I be-

lieve that is what the place is called.

Q. Is that the only time that you have appeared at that place for a performance? A. Yes, I am sure it was the only time because upon first mention I did not even recall the address. But I did dance there once for a fee and it was considered as a professional engagement. The nature of the affair I had no knowledge of.

Q. Did you contribute your services or were you paid a professional fee? A. I was paid a professional fee.

Examination of Chi Ch'ao Li

Q. Do you know whether that brotherhood festival which was conducted on February 11, 1951 bears any relationship to the brotherhood festival which presently is in effect at Wanamaker's at 8th Street and Astor Place? A. I don't know.

Q. At the time you gave your performance were you induced to do so by any political considerations? A. No.

Q. Were you aware that there were any political implications in the brotherhood festival? A. No.

Q. If you had known that there were political implications—if you had known, as is charged, that this festival was communist inspired, would you have performed? A. No.

Q. Why not? A. Because I don't believe in the cause.

Q. Not even if you are paid for it? A. Well, they don't pay enough to make me risk.

Q. You said that that was the only time you had appeared at that particular theatre. A. Yes.

Q. Have you appeared at any left wing functions in your capacity as entertainer, to the best of your knowledge? A. No.

Q. The fifth allegation concerning you pertains to your close association with persons other than your immediate

family, specifically, Kee Min Ta. Kee Min Ta was your roommate for a particular period, was he not? A. Yes.

Q. When was he your roommate and what were the circumstances of your association? A. He became my roommate, I think, in 1950 because he was the only male member of the Dance Department of the New York University School of Education.

Q. For how long was he your roommate? A. I think, until 1952 when I threw him out of the apartment.

Q. You had a personal dispute with Mr. Kee which re-

sulted in the breaking up of your living arrangements? A. Yes.

Q. Did your dispute have anything to do with politics? A. No. He threw out my cat.

Q. Was Mr. Kee active politically? A. I think he was.

Q. Was he a member of the Communist Party of the United States or of China? A. I don't know.

Q. But you do know that he was politically active? A. Yes.

Q. Did he attempt to influence your political thinking? A. Yes.

Q. In what ways? A. Oh, he persuaded me to participate in Chinese student discussion groups and various functions.

Q. Were these Chinese student discussion groups organized? Did they have a title or a name? A. I don't remember names.

Q. Where were the discussions held? A. In private homes.

Q. Did you participate in the discussions? A. No, because I did not—at the time I was not interested.

Q. At the time that you offered to share your living quarters with Kee Min Ta, were you then aware of his political activity? A. No, I was not.

Q. When did you find out about his political leanings? A. After he became my roommate.

Q. How soon after he became your roommate? A. I don't recall. It was not very soon but I don't recall the specific occasion on which he talked with me.

Q. There was nothing dramatic such as his saying to you, "Guess what! I'm a communist." A. No.

Q. If he did attempt to influence you, it was on a gradual basis? A. Yes.

Examination of Chi Ch'ao Li

Q. If you had known before he moved in with you that he was politically active, would you have offered to share an apartment with him? A. No. Furthermore, if I had known about him at all, I would not have offered to share an apartment with him. He is not an easy fellow to get along with.

Q. How much time did you spend with Kee Min Ta? A. Not much. In the beginning we went over our lessons together, that being our main purpose in living together.

Q. Do I understand that there was difficulty in your communicating with him because of any barriers? A. Yes. It is a ridiculous barrier but he speaks English with a Western Chinese accent and he hardly speaks any Mandarin Chinese.

Q. And the Chinese dialect with which you are most familiar is the Mandarin dialect. A. Yes.

Q. Do you feel that any of Kee Min Ta's political leanings rubbed off on you? A. I don't think so.

Q. Do I remember correctly your previous testimony that one of the reasons that you shared accommodations with Kee Min Ta is because the language barrier and your different activities made it inevitable that your own privacy would not be invaded or infringed upon? A. Yes.

Q. Mr. Chi, the last allegation concerning you is the reported membership in the American Youth for Democracy. Were you ever a member of that organization and if so, where and for what period of time? A. Yes, I had volunteered that information in the beginning. I was a member of the American Youth for Democracy in the year 1943 when I first entered St. John's College, and the occasion was that one of the students there organized an intercollegiate chapter of the American Youth on the campus and it offered social activities and various slogans in support of the new deal and the war effort and I became a member in that club.

However, that student who organized that club was subsequently expelled from college on personal conduct and the chapter which he organized fell to pieces.

Q. How long was that chapter in existence? A. A period of a few months.

Q. Did you ever belong to any other chapter of the American Youth for Democracy? A. No, I have never rejoined.

Q. Have you ever been in contact with any other members of that organization any time from 1943 to now? A. No.

Q. At the time that you were a member was the American Youth for Democracy devoted to any political affairs? A. None, except the common war effort.

Q. Mr. Chi, in your application for adjustment of status under Section 6, you have set forth that you are afraid to return to China, the country of your birth, nationality and last residence, because of fear of persecution. Item #8 of the application form states that:

> "China is now under control of a communist government and because of my residence and education in United States since I was eleven years old and my strong attachments to and beliefs in traditions of United States, I will be subject to persecution in China."

Is that statement correct? A. Yes, it is correct.

Q. Why do you fear persecution if returned to Communist China? A. Because I don't agree with communism on principle.

Q. What do you think would happen to you personally if you were forced to return to Communist China? A. I have no life left there because it means doing exactly what is

assigned to me.

Q. Do you feel that you would not be able to conform to their requirements? A. Yes. I feel very strongly because

my work is cultural and as a cultural worker more than as a technician, I can only work if I believe in what I am doing.

Q. Would the Chinese Communist Government be able to use you as an entertainer? A. Yes.

Q. Would you be willing to work as an entertainer for the Chinese Communist Government? A. No, I would not be willing and I would not be proficient even.

Q. Why would you not be willing to work for them? A. Because I don't believe in the goals, the exhortation of the communist government.

Q. What would happen to you if you refused to perform for them? A. I may very well be made an example of.

Q. In what way would you be made an example of? A. Imprisonment, "confession."

Q. Do you believe that you would be accepted by the Chinese Communist Government or do you believe that you would be regarded as a spy? A. I would be regarded with great suspicion.

Q. Why? A. Especially since I did not come home when my family came home and on repeated requests by the family for me to come back to China I have consistently refused.

Q. Mr. Chi, about a year ago the government of India was nominated as an agency to which Chinese students in the United States could go for safe conduct back to the mainland of China. Are you familiar with that episode? A. Yes, I am familiar. At that time my mother wrote me again the only letter I have received since I broke off communications.

Q. What did your mother write to you? A. She requested that I avail myself of the opportunity and come back.

Q. Did you go to the Indian Embassy in Washington? A. No, I did not.

Q. Did you have or do you have any desire to return to Communist China? A. No, I do not.

Q. If you were returned to China, would your family be able to shield you from possible persecution? A. No, I believe not and I don't understand their request for my coming back.

Q. Do you believe that your mother's request for you to return was a voluntary or an involuntary request on her part? A. I believe it is involuntary.

Q. Why do you think your mother sent you that letter? A. I could not understand it because for my own part I have broken off communication with the family.

Q. What makes you think that your mother's letter to you was an involuntary act on her part? A. Because she was here in this country and she knows that it is here and she herself went back to China involuntarily because she was unable to support herself and maintain herself and I don't know why she wants me now to come back.

Q. When did your mother and sister and your younger brother return to China? A. In 1950.

Q. Why did you not accompany them to China? A. Because I was fighting my life here. I was building my career and I have my friends here.

Q. If you had been sympathetic to the Chinese communist cause in 1950, could you have returned to China? A. Yes, I could have very easily. I could have gone back on United States State Department grant.

Q. If you had been sympathetic to the Chinese communist government in 1955, could you have returned to China under the auspices of the Indian Embassy? A. I could have.

Q. And you have consistently refused to return to Communist China? A. Yes.

Examination of Chi Ch'ao Li

Q. Actually you are afraid of persecution if you are returned there? A. Yes.

—44—

Q. Are you now for or against communism? A. I am against.

Q. In 1950 were you for or against communism? A. In 1950 I was against.

Q. Have you ever been actively for communism? A. No. Only in the beginning I spoke of my preference for them rather than the Nationalists. That I have mentioned and I did feel.

Q. Am I correct in saying that the only favorable attitude you have taken is attributable to your dislike of the Chinese Nationalist Government? A. Yes.

By Counsel: I have no further questions to ask.

Special Inquiry Officer to Applicant:

Q. Mr. Chi, have you been arrested or charged with a crime at any time since your last hearing here? A. No, I have not.

Q. Has your marital status changed in any way since then? A. No, it has not.

Q. Have you understood all of the questions that have been asked of you at this proceeding? A. Yes, I have.

Q. Do you have any additional statement you would like to make in your own behalf at this time? A. Yes. I am now working as an actor at the Booth Theatre with Arthur Kennedy in a play called "Time Limit," which is about brain washing of an American officer in the Korean prison camp and I myself represent a Chinese soldier in performing brutalities upon the American prisoner and each night as I perform it just makes everything more vivid of what I fear.

Examination of Chi Ch'ao Li

Special Inquiry Officer to Counsel: Mr. Neuman, a transcript of this sworn testimony will be affixed to this record as Exhibit Y.

—45—

If you have nothing further, this examination is now closed.

By Counsel: May I be furnished with a copy of this transcript for my further use in reporting back to the district court, upon the usual assurance it will not be put to any improper use.

By Special Inquiry Officer: Yes, I see no objection to it.

The examination is closed.

I CERTIFY the foregoing to be a true and correct transcript of my stenographic notes in the above case.

ELSA B. TAURIELLO
Stenographer

24561

Office - Supreme Court, U.S.
FEB 17 1958
JOHN T. FEY, Clerk

To be argued by ROY BABITT

No. 789

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United States Court of Appeals

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1957

Docket No. 24561

In the Matter of the Petition for Review of the Application of

CHA'O LI CHI,
also known as Cha'o Pieh Chi,
Petitioner-Appellant,

v.

JOHN L. MURFF, District Director of Immigration and Naturalization for the District of New York,
Respondent-Appellee.

BRIEF AND APPENDIX OF RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
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v.

JOHN L. MURFF, District Director of Immigration and Naturalization for the District of New York,
Respondent-Appellee.

BRIEF AND APPENDIX OF RESPONDENT-APPELLEE

Statement

Petitioner appeals from an order of the District Court for the Southern District of New York per Honorable John F. X. McGohey, District Judge, whereby summary judgment was granted dismissing appellant's petition for judicial review of prior administrative proceedings held by the Immigration and Naturalization Service.

This petition for review had been brought in the District Court following an adverse ruling by the Immigration and Naturalization Service on appellant's application for ad-

justment of his immigration status under Section 6 of the Refugee Relief Act of 1953, as amended. The order and judgment appealed from was filed on November 7, 1956. Notice of appeal was filed on November 14, 1956. On August 16, 1957, by order of this Court pursuant to a stipulation between the attorneys for the parties, the title of the action was amended to reflect that John L. Murff had become District Director of the Immigration and Naturalization Service for this district in place of Edward J. Shaughnessy and that he was, therefore, substituted as respondent-appellee.

The Facts

Appellant is a thirty-year-old unmarried male, a native and citizen of China, whose only entry into the United States occurred at the port of New York on February 3, 1939. He was admitted under the pertinent sections of the Immigration Act of 1924 (43 Stat. 153) as a member of the family of a Nationalist Chinese Government official. The father, the Government official upon whose status that of the appellant depended, terminated his official connection with the Nationalist Chinese Government and departed from the United States on December 9, 1946 returning to Communist China. Appellant remained in the United States notwithstanding the return of his family to the mainland of China.

On June 7, 1949, a warrant of arrest was issued, charging appellant with being subject to deportation in that he had remained in the United States after the termination of the exempt status of the member of his family who was a government official of another country. Deportation hearings were held and appellant was ordered deported on December 4, 1952.

After denial of various other forms of administrative relief from deportation, appellant ultimately made application for adjustment of status under Section 6 of the Refugee Relief Act of 1953, as amended (68 Stat. 1044-5; 50 U. S. C. App. 1971d). A hearing was held at which appellant gave extensive testimony. On May 10, 1955, the Special Inquiry Officer recommended that appellant's application for adjustment of status be denied, and this recommendation was approved by the Regional Commissioner. The denial was predicated, in part, upon the ground that on the basis of secret and confidential information, appellant would be inadmissible to the United States were he seeking to be admitted for the first time.*

Appellant thereupon instituted an action for judicial review of this administrative proceeding as well as for review of the denial of other discretionary relief. Initially, United States District Judge Noonan, in an unreported memorandum opinion filed October 4, 1955 (App'l't's App. pp. 2a-9a), denied the Government's motion for summary judgment to dismiss the complaint, and directed a remand to the appropriate hearing officer of the Immigration and Naturalization Service for a hearing consistent with the Court's opinion (App'l't's App. pp. 10a-11a). Judge Noonan had held that, since the application for relief under Section 6 of the Refugee Relief Act was denied on the basis of secret and confidential information tending to show that appellant would be inadmissible to the United States were he applying now for such admission, appellant had been denied due process of law under the rationale of *Chew* v. *Colding*, 344 U. S. 590 (1953), and that he was entitled to know the broad nature of the secret and confidential information being used against him as to

* One of the statutory prerequisites for relief under Section 6 was legal admissibility to the United States.

his "admissibility". Judge Noonan, however, at the same time expressly recognized the propriety of the use of such information in that phase of the proceeding wherein appellant hoped to show that he would be subjected to physical persecution if deported under Section 243(h) of the Immigration and Nationality Act (8 U. S. C. §1253(h)). Judge Noonan's order was filed on December 5, 1955.

Neither side appealed; and consistent with Judge Noonan's opinion, a reopened hearing was held on March 25, 1956, by the Immigration and Naturalization Service. Appellant was represented by counsel, and a resume of the confidential information affecting appellant was introduced into the record of the proceedings. Appellant's attorney gave no indication of being dissatisfied with the sufficiency of the disclosures thus made but proceeded to direct his own examination of the appellant. In this examination he sought to explain away the import of the erstwhile confidential information and also (presumably) to have appellant establish as an affirmative fact that he had reason to fear persecution or that he would be persecuted upon his return to China.

On April 10, 1956, the Special Inquiry Officer recommended that the application for adjustment of status be denied upon the ground that appellant had failed to establish that he had reasonable grounds to fear persecution upon his return to China because of his political opinions. This recommendation was adopted by the Regional Commissioner on May 9, 1956.

Appellant then moved again for injunctive relief and for a judicial review of the administrative determination

(Appellee's App. pp. 1a-3a). Respondent cross-moved for summary judgment (Appellee's App. pp. 4a-7a). Judge McGohey, in a memorandum opinion, denied the petition for review and the motion for an injunction and granted the cross-motion for summary judgment dismissing the complaint (App'l't's App. 12a-15a).

This appeal followed the entry of an order consistent with Judge McGohey's opinion (App'l't's App. p. 16a).

Statute Involved

Section 6 of the Refugee Relief Act of 1953 (67 Stat. 400) as amended by the Act of August 31, 1954 (68 Stat. 1044-1045); 50 U. S. C. App. 1971d, provides:

> Sec. 6. Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of enactment of this Act and is otherwise qualified under all other provisions

of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided*, That the provisions of this section shall not be applicable to any aliens admitted into the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754) Public Law 402, Eightieth Congress, second session (62 Stat. 6): *Provided further*, That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand.

Introduction to Argument

The appellant, admittedly deportable as one unlawfully in the United States, sought an adjustment of his status to that of a permanent resident on the ground of possible persecution in China if deported thereto. In challenging the denial of this discretionary relief by the Attorney General, appellant makes two arguments to this Court.

First, he claims that the denial of his application for an adjustment of status is unsupported by the evidence of record and is completely arbitrary.

Secondly, he asserts that *ex parte* confidential information was used at least as a partial basis for the adverse administrative determination, thereby violating his rights under the Constitution and the Administrative Procedure Act.

The Government's reply to these arguments may be summarized as follows:

A. The administrative record on its face clearly justifies the finding that appellant has failed to sustain his burden of affirmatively establishing that he had grounds to fear persecution if deported.

B. Appellant's charge concerning the use of *ex parte* information by the Attorney General avails him nothing: first, because the record fails completely to show that there was any reliance upon such assumed *ex parte* information; and secondly, even were the contrary true, the use of confidential and undisclosed information on an application for purely discretionary relief has been sustained in the Courts.

ARGUMENT

POINT I

Appellant failed to sustain his burden of establishing that he had reasonable grounds to fear persecution if sent to China.

It will be contended in Point II, *infra*, this brief, that an application for relief under the Refugee Relief Act (such as the one made by this appellant), being one essentially addressed to executive discretion, is not governed by the usual rules concerning hearings on matters of "right", and that the sufficiency of the evidentiary basis for administrative findings cannot properly be subjected to the same type of judicial review which obtains, for example, where an alien is attacking the factual basis of his claimed deportability. In short, it will be contended in Point II that since the appellant's application was one addressed to executive discretion, the legal "sufficiency" of the basis for executive denial of the application is not subject to judicial review.

We shall, for the present, however, proceed on the contrary assumption that the appellant in this case would have been entitled to judicial relief in the court below had he been able to establish that the administrative finding of the Attorney General (to the effect that the appellant had failed to establish any rational basis for an inference of persecution if deported) was a finding repugnant to the evidence of record.

The only issue before the Special Inquiry Officer was whether or not appellant has made out his case*. The determination that appellant had failed to establish his vulnerability to persecution was based upon record evidence from which the Special Inquiry Officer concluded that appellant's claimed fear of persecution was unfounded and unsupported. The issue of fact having been resolved against appellant on evidence of record, the only issue remaining for judicial determination is whether or not there is sufficient evidence in this case to warrant such finding. Unless it could be said by this Court that the findings of the Special Inquiry Officer are so bereft of support in the record as to require judicial intervention, appellant has no standing to compel judicial review.

Where there is jurisdiction, a finding of fact by the Executive Department is conclusive and there is no judicial power to intervene unless there is either a denial of a fair hearing, application of an erroneous rule of law or a finding unsupported by evidence. See *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922).**

---

* No matter to what degree appellant claims to have "refuted" the previously undisclosed adverse information, we submit that his refutation did not establish that he would be persecuted, or even that he had reasonable cause to fear same as an objective fact. Appellant offered no affirmative proof. His whole testimony consisted of mere self-serving denials of the inferences which might reasonably be drawn from his admitted past activities and associations. But these denials do not affirmatively establish reasonable grounds for fear of persecution.

** There is no contention that the hearing was unfair or that there was an application of an erroneous rule of law. In connection with the former, neither at the reopened administrative hearing nor before Judge McGohey nor on the pleadings was there any objection that the hearing was rendered unfair because the Government adverted at all to what prior to its disclosure, consistent with Judge Nooman's order, was confidential information. That failure to object, even assuming that a valid objection could lie, really precludes consideration of whether or not error was committed in this respect.

Moreover, where the issue resolves itself into a determination based upon an evaluation of the testimony and the record evidence, the witness' demeanor, and the probative value and the weight to be given to conflicting evidence, it is equally well settled and no longer open to dispute that the conclusion of the administrative officer is invulnerable in the courts unless it can be said that it could not conceivably have been arrived at by a fair minded man and is therefore arbitrary. See *Kumaki Koga* v. *Berkshire*, 75 F. 2d 820 (9th Cir. 1935), *cert. denied* 295 U. S. 757 (1935) *sub nom. Koga* v. *Carr; Flynn ex rel. Yee Suey* v. *Ward*, 104 F. 2d 900 (1st Cir. 1939); *Impastato* v. *O'Rourke*, 211 F. 2d 609 (8th Cir. 1954), *cert. denied* 348 U. S. 827 (1954). Neither the District Court nor this Court will weigh administrative evidence; and judicial review is limited to a determination as to the substantial fairness of the proceedings. The court does not weigh the merit of competing inferences once it is determined that there is a reasonable probability of the facts found by the administrative agency, and the mere fact that the court feels that it would not have made that finding of fact is not sufficient to set aside the administrative finding. See *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103 (1927), where the Court said at p. 106:

> "Upon a collateral review . . ., it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a Court of the essential unfairness of the trial . . ."

See also *Tisi* v. *Tod*, 264 U. S. 131 (1924).

In the instant case, the Special Inquiry Officer's determination that appellant had not established fear of persecution is a finding which is manifestly not so "devoid of evidence" as to enable appellant to obtain judicial intercession. It should be remembered what appellant was required to establish. He was required to establish that he is unable to return to China because of persecution or fear of persecution on account of his race, religion or political opinion. The mere self-serving statement that one has reason to fear persecution arising out of a natural reluctance to be compelled to leave the United States falls far short of the satisfaction of a burden of proof whether in a judicial proceeding or in an administrative proceeding. Appellant could offer no better evidence in support of the burden than the assertion that he thought he would not be permitted to dance without State supervision and that he would have to do exactly what is assigned to him. He further stated that his is a cultural type of work and that as a cultural worker rather than as a technician, he could work only if he believed in what he was doing. On that basis, he claimed that he would not be willing to work as an entertainer and he could not even be proficient notwithstanding his admission that he could engage in his cultural art in Red China. He further admitted that his mother had written to him to return to China and that his family was not under any duress.

It cannot be too highly emphasized that the appellant did *not* present the case of a man who had, by open and avowed advocacy of anti-communism, rendered himself a marked man in Communist circles. Appellant's proof was bereft of a showing that he had spoken or written anything of a public nature which would have in any sense compromised him.

On the contrary, the Special Inquiry Officer had before him evidence of appellant's pristine respect for the agrarian "reforms" of the Chinese Communists, as well as the fact that his father, notwithstanding his prior employment by the Chinese Nationalist Government, remained, after the capitulation of Peking to the Communist forces, a professor at Peking University. Most important of all, appellant admitted that he had never been overtly anti-communist in this country.

In that posture and in accordance with the overwhelming weight of judicial authority, this Court should not disturb the administrative determination, or substitute its judgment for that of the Special Inquiry Officer. It is not even necessary for us to say, in support of the Special Inquiry Officer's decision, that he disbelieved appellant. Compare *United States ex rel. Watts* v. *Shaughnessy*, 206 F. 2d 616 (2d Cir. 1953). We reiterate that the testimony given by appellant in support of his application, even if given full credence despite its self-serving nature, fell far short of what any reasonable hearing officer would accept as satisfaction of that burden. See *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288 (2d Cir. 1952), *cert. denied* 345 U. S. 928 (1953).

POINT II

Appellant's objection to the alleged use of *ex parte*, evidentiary material is without merit, both because (A) the administrative record fails to show any reliance upon any "confidential" data; and (B) because, even had confidential information been used, such use has received prior judicial approval.

A

In asserting that, in addition to the alleged "insufficiency" of the basis for the Attorney General's adverse finding, such finding is also infected by the use of confidential data not disclosed to the alien, the appellant is raising a feigned issue, not only unsupported by the record, but an issue that was not even raised in the court below.

Originally, of course, the appellant's application was denied administratively on the purported basis of confidential information. (See order of May 10, 1955, Administrative Record) However, Judge Noonan having, correctly or otherwise,* initially remanded the matter for

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* It will be noted that in his intermediate ruling, Judge Noonan differentiated between the propriety of the use of confidential information by the Government in determining the likelihood of persecution of an alien in the event of his deportation, and the lack of propriety of the use of such confidential information in connection with a "predetermination" of the alien's legal "admissibility", such legal "admissibility" being one of the qualifying factors of eligibility for relief under Section 6 of the Refugee Relief Act. The Government did not appeal from this decision, *inter alia*, because the conditions of Judge Noonan's remand could be complied with without compromising security. Had an appeal been taken, the Government could have contended that the use of secret and confidential information on the issue of admissibility is no less proper than on the issue of persecutability. This argument would have been based upon the pro-

further hearings, at which Judge Noonan directed that the Attorney General should furnish the alien with the "broad nature" of any adverse information in possession of the Service pertaining to the alien, his directive was fully complied with, thereby giving appellant a full opportunity to meet any such adverse information.

Despite his failure, at that second hearing, to have unequivocably demanded to know the source or sources of the adverse information—and despite his further failure to have objected thereto in the pleadings in this case or in the hearing before the District Court—appellant now claims that error was committed by the Attorney General in not furnishing the sources of the information gratuitously.

Even were it proper, at this late date, for appellant to claim prejudicial error by reason of his failure to have been informed of the precise "sources" of the "confidential" information, such claim would be frivolous and utterly without merit in the context of this particular case. This is so because, substantially speaking, the specifications of adverse information given to the alien were conceded to

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visions of the Immigration and Nationality Act providing for the use of secret and confidential information in connection with an application for admission to the United States. See Section 235(c) of the Act (8 U. S. C. 1225(c)). Thus, an alien who seeks to enter the United States could do so only under the procedures prescribed by Congress including those authorizing the use of confidential information. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950). On the basis of the foregoing it might then have been argued that the same standard should be permissible with respect to one who seeks adjustment of status and upon whom it is incumbent to show that he would be admissible to the United States were he then abroad seeking admission. But, compare *Chew* v. *Colding*, 344 U. S. 590 (1953).

be essentially correct by the alien himself in his testimony. He merely testified, by way of confession and avoidance, that the assertions made against him in the specifications did not in fact warrant the inference that he was a sympathizer with the Communist cause.

More importantly, the record itself is devoid of any affirmative indication that the hearing officer relied upon any evidence that was not made a part of the record. It is the time honored practice of the Immigration Service and the Attorney General, when circumstances require it to resort to evidentiary material of an *ex parte* nature, to state on the record that that has been done (see e. g. testimony of Thomas G. Finucane, Chairman of the Board of Immigration Appeals at page 127(a) in record on appeal *Accardi* v. *Shaughnessy*. Court of Appeals, Docket No. 23191, October Term, 1954. See also in addition, the original notation of the Hearing Officer in the instant case, wherein the Hearing Officer adverts specifically to the use of confidential information as a basis for his decision.) No such reference is to be found in the latest decision of the Hearing Officer; and it is crystal clear from the record that the Hearing Officer was satisfied (and justifiably so) from the testimony of the appellant himself that the appellant had completely failed to furnish any rational basis for the inference that he might be persecuted because of his political views should he be returned to China.

Actually, the record indicates clearly that the ultimate facts previously derived from confidential sources, but freely disclosed at the final hearing, were used purely for the purpose of assisting the appellant into steering his testimony into the area in which the Government was interested in having him testify in support of his applica-

tion. Such steering was adequately conducted by appellant's counsel, who used the disclosures (and quite properly) as a starting point from which he could conduct appellant's examination. The appellant, having in effect admitted to questionable associations, then proceeded to insist that such associations should not, in his case, be unfavorably construed, since he was now favorably disposed toward democracy and opposed to Communism. He added, as already discussed in this brief, that as a cultural performer he might find it difficult to reconcile his art with that art which might possibly be demanded of him by the Communist regime. Hardly a reason for the granting of the extraordinary discretionary relief sought by the appellant!

B

It need hardly be restated here that an alien's application for relief from deportation addressed to the discretion of the Executive Branch of the Government is not subject to judicial review or, at best, is subject only to severely circumscribed judicial review. Undoubtedly, in a decision by the administrative agency affecting the alien's *right* to remain in the United States or to be expelled therefrom under an order of deportation, the courts will review the administrative decision in order to determine whether or not the hearing was fair, whether or not correct rules of law were applied or whether or not there is evidence to support the finding of deportability. See Section 242(b) and Section 242(b)(1-4) of the Immigration and Nationality Act (8 U. S. C. §1252(b) and §1252(b)(1-4)); *Kessler* v. *Strecker*, 307 U. S. 22, 34 (1939); *United States ex rel. Vajtauer* v. *Commissioner, supra.* Such considerations do not, however, obtain in

cases where what the alien seeks is not a matter of *right* but is a matter addressed solely to the discretion of the Attorney General and wherein it is sought to be relieved from deportation by way of executive dispensation.

The courts have sharply circumscribed the area of judicial review of the exercise of administrative discretion and have repeatedly held that an alien has no privilege to have the decision reviewed in the courts nor any Constitutional right to demand that it should. The power of the Executive Branch of the Government to suspend or waive or withhold deportation is a dispensing power not unlike a court's power to suspend execution of a sentence. It is a matter of executive grace. More often than not, the granting of the discretionary relief of suspension and/or waiver of deportation is a matter of joint executive and legislative clemency. That the Attorney General has here exercised his discretion unfavorably does not give the rejected applicant a right to judicial review. (See *Jay* v. *Boyd*, 351 U. S. 345 (1956); *United States ex rel. Hintopoulos* v. *Shaughnessy*, 233 F. 2d 705 (2d Cir. 1956), *aff'd* 353 U. S. 72 (1957); *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369 (2d Cir. 1948), *cert. denied* 333 U. S. 876 (1948); *United States ex rel Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (2d Cir. 1950); *United States ex rel. James* v. *Shaughnessy*, 202 F. 2d 519 (2d Cir 1953), *cert. denied* 345 U. S. 969 (1953).

In this area of executive discretion, it is recognized that whatever an alien applicant for executive bounty receives in the nature of a hearing, that is all he can expect. The Attorney General has virtually unfettered discretion and even if it be assumed that Congress had given an applicant a right to offer evidence, the discretionary power vested in the Attorney General gives no right to the kind of hear-

ing "which contemplates full disclosure of the considerations entering into a decision." *Jay* v. *Boyd, supra; United States ex rel. Matranga* v. *Mackey,* 210 F. 2d 160 (2d Cir. 1954); *United States ex rel. Dolenz* v. *Shaughnessy,* 206 F. 2d 392 (2d Cir. 1953). The Attorney General could, even where an application was entirely regular on its face, reject that application on the basis of confidential information indicating that the applicant was essentially undeserving of the relief available by a favorable exercise of discretion. The right to be confronted and any other rights accorded in ordinary administrative proceedings, either as a necessary incident of the Constitutional guarantees of due process of law or as a necessary incident of the Administrative Procedure Act, simply do not exist. The provisions of the Administrative Procedure Act (5 U. S. C. §§1001 *et seq.*) clearly apply only in cases where formal hearings are required by law with respect to matters of right, and have no application whatever to petitions addressed to executive clemency. An application for adjustment of status under Section 6 of the Refugee Relief Act, as amended [68 Stat. 1044-45, 50 U. S. C. App. §1971d], is essentially one addressed to executive discretion. Indeed, a reading of the statute shows that in at least one respect it is closely parallel to Section 243(h) of the Immigration and Nationality Act [8 U. S. C. §1253(h)]. We refer to the question of possible exposure to physical persecution as a ground for withholding of deportation. In construing the latter statute, this Court has repeatedly held that an application to the Attorney General to withhold deportation upon the ground that the applicant fears physical persecution if deported under Section 243(h) of the Immigration and Nationality Act is discretionary in nature and, therefore, not reviewable. See *United States ex rel. Dolenz* v. *Shaughnessy,* 200 F. 2d 288 (2d Cir. 1952), *cert. denied*

345 U. S. 928 (1953); *United States ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (2d Cir. 1954).

Congress, in enacting Section 243(h) of the Immigration and Nationality Act, made it eminently clear that an application for a stay of deportation upon the grounds of persecution is dependent entirely upon the "opinion" of the Attorney General or his delegate. The statute carefully avoided the use of any language which might imply the requirement of a formal trial and ruling upon admissible evidence.*

In that particular, there is no logical reason why Section 6 of the Refugee Relief Act should be treated any differently. The relief requested by the applicant is not only one addressed to joint executive and legislative discretion, but the determination as to the alien's vulnerability to "persecution" of necessity lies purely within the executive political field; and the courts have accordingly declined steadfastly to intervene in such matters.**

Moreover, and even if we were not here dealing with a discretionary application (and thus one not requiring any

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* It should be noted that the first section ever enacted wherein provision was made for the Attorney General to withhold deportation on grounds of possible persecution was Section 23 of the Internal Security Act, which amended former 8 U. S. C. §156. Prior to its repeal by the present Act, that Section read as follows:

> "No alien shall be deported under any provisions of this act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Under that Statute it was frequently contended that the provision concerning the authority of the Attorney General to "find" that an alien would be persecuted required that a formal hearing of some kind should be had. This Court, of course, held otherwise in the *Dolenz* case, reported at 200 F. 2d 288, *supra*.

** A decision concerning the possible future persecution of an alien in a foreign country is surrounded by elements of prophesy and speculation. Such a decision requires the executive officer to

formal hearing at all), appellant is wholly in error in suggesting that the provisions contained in Section 7 and other Sections of the Administrative Procedure Act relative to the general conduct of administrative proceedings and the mechanics of offering evidence have any bearing whatsoever upon the exercise by the Attorney General and his hearing officers of the executive function in administering immigration matters. The 1952 Immigration Act has a self-contained procedure for proceedings affecting an alien's right to remain in the United States; and obviously (and as frequently held by the courts, e. g., *Marcello* v. *Bonds*, 349 U. S. 302 (1955) at pp. 305-310) the hearing provisions of the Administrative Procedure Act do not govern at all in immigration matters.

Parenthetically, of course, it should be noted that in a deportation proceeding where deportability is in issue, an alien *is* entitled to all the rights of presentation and examination of evidence to which he would be entitled if Section 7 of the Administrative Procedure Act were applicable; and it is only because the context of the present case deals with a matter of *discretion*, and not with a matter of an alien's right (that is, his Constitutional right to a fair hearing on a charge which

---

call upon every possible avenue of experience, information and judgment to assist him in making his decision. The Attorney General is in a position to have access to vast security and confidential information from investigative branches of the Government and from foreign sources, obtained through diplomatic channels. The use of such information places the Attorney General in the best position to exercise judgment and to rule upon possible future trends in foreign countries. See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), at p. 488. Compare the language of the Supreme Court in *C & S Airlines* v. *Waterman Corp.*, 333 U. S. 103 (1948), at p. 111, in connection with a parallel executive power. For a square holding, see the *Dolenz* and *Moon* cases, *supra*, and also *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (2d Cir. 1953).

may affect his claim of the right to remain in the United States) that we make the contention that the Attorney General would here have the right to use confidential information. Such contention, of course, is not to be construed as a concession that such confidential information was in fact used. The record demonstrates the contrary.

CONCLUSION

The order of the District Court, dismissing the complaint, should be affirmed.

Respectfully submitted,

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York.
Attorney for Respondent-Appellee.

ROY BABITT,
Special Assistant U. S. Attorney.

HAROLD J. RABY,
Assistant U. S. Attorney.

Of Counsel.

September, 1957.

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APPENDIX

Notice

(45)

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that upon the annexed Motion for Review of Marvin M. Neuman, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Motion Term thereof, at the United States Courthouse, Foley Square, New York, Room No. 506, on the 12th day of June, 1956, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a review of the administrative decision heretofore rendered, and for such other and different relief as to the Court may seem just and proper in the circumstances.

Dated: New York, New York
June 4, 1956.

Yours, etc.

MARVIN M. NEUMAN
Marvin M. Neuman
Attorney for Plaintiff-Petitioner
Office & P. O. Address
1776 Broadway
Borough of Manhattan
City of New York

Notice

To:

PAUL C. WILLIAMS, Esq.
United States Attorney
New York City, New York

Motion for Review

(46)

[SAME TITLE]

The petitioner above named, by his attorney, Marvin M. Neuman, Esq., submits the within Motion to Review an Administrative Decision, upon the following bases of facts:

1. This is an action for a declaratory judgment, under the Declaratory Judgment Act (28 U. S. C. 2201), and for review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.), and under the Immigration and Nationality Act (8 U. S. C. 1, et seq.). [Sic].

2. On September 30, 1955, the Hon. Gregory F. Noonan, Judge, United States District Court, Southern District of New York, published the Opinion in this matter, followed by Order, signed on December 2, 1955.

3. Pursuant to said Opinion and Order, the Defendant-Respondent conducted an examination of the Plaintiff-Petitioner, said examination having taken place on March 27, 1956.

(47)

4. On April 10, 1956, the appropriate Hearing Officer of the Defendant-Respondent prepared a recommendation denying the alien's application for adjustment of status.

5. On May 17, 1956, the Regional Commissioner ordered that the application be denied. Attached hereto and made a part hereof is the final administrative order entered in this matter.

6. It is submitted that the final administrative determination is against the evidence and is against the weight of the evidence.

7. It is submitted that the recommendation of denial is based upon a conclusion reached by the Defendant-Respondent, which conclusion is based upon no evidence of record.

8. It is submitted that the alien has established beyond question a reasonable and legitimate fear of persecution, if returned to his native country, and that the conclusion reached by the administrative officers that he has failed to establish reasonable grounds on which to fear persecution is an arbitrary and capricious determination.

WHEREFORE, the Petitioner prays for a judicial review of the aforesaid determination, and for such other relief that to the Court may seem proper.

Respectfully submitted,

MARVIN M. NEUMAN
Marvin M. Neuman
1776 Broadway
New York 19, New York

Dated: New York, New York
June 4, 1956

Notice of Cross-Motion

(51)

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Roy Babitt sworn to the 17th day of July, 1956, upon the administrative record herein, and upon all prior proceedings herein, the undersigned will cross move this Court at a term for motions thereof, in Room 506, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 31st day of July, 1956, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment dismissing the complaint herein, on the ground that no genuine issue as to any material fact exists, and that defendant-respondent is entitled to judgment as a matter of law, and for such other, further and different relief as may appear just and proper.

Dated: New York, N. Y., July 17, 1956.

(52)

Yours, etc.

THOMAS B. GILCHRIST
Acting United States Attorney
for the Southern District of
New York
Attorney for Defendant-Respondent
Office & P. O. Address:
United States Courthouse
Foley Square
New York 7, N. Y.

Notice of Cross-Motion

To:

MARVIN M. NEUMAN, Esq.
Attorney for Plaintiff-Petitioner
1776 Broadway
New York, N. Y.

Affidavit of Roy Babitt

(53)

[SAME TITLE]

State of New York,
County of New York,
Southern District of New York—ss.:

ROY BABITT, being duly sworn, deposes and says:

1. I am a Special Assistant United States Attorney in the office of the United States Attorney for the Southern District of New York, and am fully familiar with the facts in this case.

2. This affidavit is submitted in opposition to what plaintiff-petitioner calls a motion for review of an administrative decision and in support of defendant-respondent's cross-motion for summary judgment dismissing the complaint herein on the ground that no issue of material fact exists, and that defendant-respondent is entitled to judgment as a matter of law, in that it appears from the record of prior administrative proceedings that

the plaintiff-petitioner herein after fair and legal hearings has been found properly deportable, and further that the denial of relief under Section 6 of the Refugee Relief Act (54) has in all respects been proper.

3. The plaintiff-petitioner herein challenges the validity of a prior administrative determination wherein he was denied relief under Section 6 of the Refugee Relief Act, and therefore, whatever merit exists in the complaint depends upon disclosures made by the administrative record. Therefore, such administrative record is incorporated herein by reference as Exhibit A and is presently available for inspection by plaintiff-petitioner or counsel in the office of the United States Attorney, and will be tendered to the Court as an exhibit on the argument of the instant cross-motion.

4. The petition for review does not address itself to the finding of deportability nor does it in anywise contest any of the other administrative determinations had herein. It addresses itself solely to the decision of the Immigration & Naturalization Service on plaintiff-petitioner's application for relief under Section 6 of the Refugee Relief Act upon the remand to said Service on order of this Court dated December 5, 1955. Thus, the only question raised involves the propriety of the administrative determination that plaintiff-petitioner's application for relief should be denied on the ground that applicant had failed to establish reasonable grounds upon which he could show fear of persecution upon his return to China. The foregoing is a conclusion of law properly determinable in the instant cross-motion.

Affidavit of Roy Babitt

WHEREFORE, deponent prays that plaintiff-petitioner's motion for review be denied in all respects (55) and defendant-respondent's cross-motion for summary judgment dismissing the complaint on the ground that no issue of material fact exists and that defendant-respondent is entitled to judgment as a matter of law, should be granted.

/S/ ROY BABITT

(Sworn to July 17, 1956.)

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FILED
FEB 17 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 789

CHA'O LI CHI,

Petitioner,

—v.—

JOHN L. MURFF, District Director of Immigration and Naturalization for the District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

CHA'O LI CHI,

Petitioner,

—v.—

JOHN L. MURFF, District Director of Immigration and Naturalization for the District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cha'o Li Chi prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 31, 1957 affirming the judgment of the District Court for the Southern District of New York which had granted respondent's motion for summary judgment and denied the petitioner's petition for a judicial review of a prior administrative decision denying petitioner the relief provided by §6 of the Refugee Relief Act of 1953 (50 U. S. C. App. 1971d).

Opinions Below

The two opinions of the District Court (R. 3-9, 12-15)* are not reported. The opinion of the court below (App. 22-31) has not yet been reported.

* References to the Appellant's Appendix in the court below filed with this petition are designated "R" and references to the appendix to this petition are designated "App."

Jurisdiction

The judgment of the court below was dated and entered on December 31, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. §§1254(1) and 2101(c).

Questions Presented

1. Whether Congress in the Refugee Relief Act of 1953 has authorized the use of confidential information by the Attorney General and his subordinates in determining applications for permanent residence under §6 of the Act.

2. Whether the Administrative Procedure Act of 1946 prohibits the use of confidential information in determining applications for permanent residence under §6 of the 1953 Act.

3. Whether use of the confidential information, if authorized by Congress, denied petitioner due process of law.

4. Even if confidential information were not the basis of the adverse administrative decision, whether that decision denied petitioner due process of law and a fair hearing because it was not based on and was contrary to all the evidence that petitioner actually feared persecution if deported to China.

Statute Involved

Section 6 of the Refugee Relief Act of 1953 (67 Stat. 400), as amended by the Act of August 3, 1954 (68 Stat. 1044) provides in part (50 U. S. C. App. 1971(d)):

> "Sec. 6. Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as

a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. * * * "

Statement of the Case

The facts disclose the unrelenting efforts of the Government to deport to Communist China a law-abiding Chinese alien who has lived in the United States without interruption since he entered lawfully in February 1939 as an eleven

year old member of the family of an accredited official of the Chinese Nationalist Government. The petitioner, now 31 years of age, has received practically his entire education in the United States including attendance at St. John's College beginning in 1943 (R. 41) and ending with a course in the Dance Department of New York University School of Education (R. 39) following which he became a professional dancer (R. 38). He is no security risk to the United States and yet he has been systematically denied the various types of discretionary relief Congress has provided for aliens stranded in the United States by political changes at home partly on the ground that the other members of his immediate family returned to China and principally on the ground of confidential information which, very instructively, proved to be of a most flimsy, and in part ludicrous, character when its substance, but not its source or the witnesses, was revealed following the first decision of the District Court in this case requiring such partial revelation (R. 3-9).

In 1946 the petitioner's father returned to Nationalist China on the orders of his government which employed him (R. 29) leaving his wife, a daughter and two sons, including petitioner, in the United States. On May 11, 1950 the Board of Immigration Appeals granted the mother and three children suspension of deportation and referred the cases to Congress pursuant to §19(c) of the Immigration Act of 1917, as amended (8 U. S. C. 155) under which they would have automatically received permanent residence unless Congress passed a concurrent resolution stating that it did not favor suspension of deportation. But in 1951, while awaiting the required period of Congressional consideration, petitioner's mother and sister returned home to the father in China and thereupon the Commissioner of Immigration and Naturalization withdrew the suspension case from Congress and reopened it, and pending its further consideration the petitioner's brother also returned to

China (App. 24). The petitioner, however, had refused to go back to China with his family and had also refused repeated subsequent requests by them to go back to China in view of "my residence and education in the United States since I was eleven years old and my strong attachments to and beliefs in traditions of the United States, I will be subject to persecution in China" (R. 42). On December 4, 1952, after a further hearing, petitioner's application for suspension of deportation, granted before his family returned to China without him, was finally denied and he was ordered deported (App. 25).

Thereupon, having been denied suspension of deportation, petitioner applied for the other discretionary relief provided by Congress in the form of a stay of deportation (§243(h) of the Immigration and Nationality Act) and for permanent residence under §6 of the Refugee Relief Act of 1953, *supra*, on the ground of his fear of persecution for his democratic political views if deported to Communist China. The stay of deportation was denied on the ground that he would not be subject to physical persecution in China and permanent residence under §6 of the 1953 Act was also denied on the ground that the petitioner could not comply with the statutory requirement that he be qualified for admission under the Immigration and Nationality Act in that he was excludable under §212(a)(27) (8 U. S. C. 1182).[1] The denial of both of these applications was based on confidential information not disclosed to the petitioner or his counsel.

The petitioner invoked the jurisdiction of the District Court under the Declaratory Judgment Act (28 U. S. C.

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[1] Section 212(a)(27) provides that the classes of aliens excluded from admission shall include "(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; • • • ."

2201) and the Administrative Procedure Act (5 U. S. C. 1001 ff.) by a petition seeking review of the legality of the denial of a stay of deportation under §243(h) of the 1952 Act and of permanent residence under §6 of the 1953 Act on the basis of confidential information. District Judge Noonan, on the authority of the second *Dolenz* decision in the court below (206 F. 2d 392; cf. 200 F. 2d 288, c. d. 345 U. S. 928), held that the use of confidential information to deny a stay of deportation was authorized by Congress (R. 6-7) by the language of §243(h) of the 1952 Act which delegated the question to be decided by the Attorney General in his "opinion." But, the court held, the different language of §6 of the 1953 Act indicated that "Congress must have intended that the alien should be informed of the nature of the information being used against him so that he might attempt to rebut it" (R. 7) and remanded the case to the Service for a further hearing on the application for relief under §6 of the 1953 Act consistent with the ruling that petitioner was entitled to know "the broad nature of the 'secret and confidential' information being used against him; * * *" (R. 9).

The Government did not appeal from Judge Noonan's decision and at the reopened hearing informed petitioner's counsel of the broad nature of the confidential information by stating six charges or categories of alleged adverse confidential information (R. 23-24). A request for the specific evidence upon which these charges were based and the names of the informants who made the charges was denied by the special inquiry officer who stated that he was "not permitted to disclose anything further, specifically as to the nature of the evidence" (R. 25-26). The petitioner answered fully and convincingly the six charges based on confidential information (R. 26-42) and in addition testified concerning the reason for his fear of persecution in Communist China (R. 42-45). The special inquiry officer

abandoned the prior ground for denial of relief under the 1953 Act, alleged inadmissibility under the catch-all language of §212(a)(27) quoted above, and in a brief decision, still relying on the confidential information completely refuted by petitioner, concluded that "Despite the applicant's categorical denial of the allegations contained in the confidential and secret information, the broad and general nature of which was disclosed to the applicant, it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution because of his political opinions should he return to China, and his application for adjustment of status should be denied on that ground" (R. 19).

On further review in the District Court (R. 12) Judge McGohey noted that the "broad nature and the purport of the secret and confidential information were disclosed by the examiner in six categories" and he was given an opportunity to meet this information (R. 13), and then held that the special inquiry officer was not obliged to accept the petitioner's explanations and that therefore it could not be determined judicially that the special inquiry officer had acted arbitrarily in concluding that the petitioner had failed to establish reasonable grounds for fear of persecution if returned to China (R. 15). The District Court relied for its decision upon *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, approving the use of confidential information upon denial of a stay of deportation under §243(h) of the 1953 Act and also upon *U. S. ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (C. A. 2), relying upon the *Dolenz* decision and emphasizing the limited nature of judicial review of decisions under §243(h) in a case apparently not involving confidential information.

Pending appeal from the District Court to the court below, and following the decision of this Court in *Jay* v. *Boyd*, 351 U. S. 345, the regulation permitting the use of

confidential information was amended, effective November 6, 1956, to provide that such information could not be used in the discretion of special inquiry officers unless "the Commissioner has determined that it is in the interests of national security and safety to do so" (8 C. F. R. 242.17(c)).[2] Following the issuance of the new regulation petitioner's counsel on November 13, 1956 wrote to the Solicitor General suggesting that in view of the new regulation and the difference between the language of §6 of the 1953 Act and the language of §244 of the 1952 Act (8 U. S. C. 1254) construed in *Jay* v. *Boyd*, *supra*, this appeal should not proceed but should be withdrawn by petitioner upon the grant of a further administrative hearing under the new regulation governing the use of confidential information. On December 26, 1956 the United States Attorney replied that it was the view of the Department of Justice that the case should not be considered further administratively but that the appeal should be defended.

The court below agreed with the petitioner that the special inquiry officer did rely upon the confidential information (App. 30) but held that "Congress apparently intended no different procedure in ascertaining these conditions [in China] for the purposes of a Section 6 application" than for an application under §243(h) of the 1952 Act upon which confidential information could be used, citing the second *Dolenz* decision.

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[2] The Commissioner announced in connection with the new regulation (New York Times, November 1, 1956):

> "Under the new regulation, hearing officers will not be permitted to consider or rely on information undisclosed to the alien unless the Commissioner has personally reviewed the case and has satisfied himself that every effort to develop evidence through Service investigation and investigation by other Governmental agencies has been exhausted, and that the information is of sufficient importance to the nation's safety or security as to require its submission to the hearing officer."

REASONS FOR GRANTING THE WRIT

I.

The 1953 Act does not authorize use of confidential information.

The court below plainly erred as a matter of law in applying its second *Dolenz* decision, 206 F. 2d 392, and holding that Congress in §6 of the 1953 Act intended to delegate the determination of an alien's "persecution or fear of persecution" to the Attorney General as completely as §243(h) of the 1952 Act was construed to have delegated the determination of a stay of deportation to any country which "in his [the Attorney General's] opinion the alien would be subject to physical persecution" with the result that under §6 as well as under §243(h) Congress authorized the use of confidential information in making the determination. This case presents an important undetermined question in the administration of the 1953 Act, and in the use of confidential information to deny relief authorized by Congress, which should be reviewed by this Court. Compare *Jay* v. *Boyd*, 351 U. S. 345. Various separate considerations make clear the error of the court below.[3]

1. *Text of §6 and §243(h).*—A comparison of the pertinent language of §243(h) and §6 discloses that the former is calculated to give the Attorney General the broadest discretion in forming his "opinion" on the question of

[3] The court below, deciding the merits, remarks in passing that petitioner "did not mention any alleged unlawful or unconstitutional receipt of evidence" (App. 29). This statement is contrary to the record because the petition seeking judicial review expressly states that there was a denial of due process in that the decision was "based on confidential and secret information not disclosed to the petitioner" (second amended petition verified July 20, 1955 and filed July 21, 1955 (App. 28, 34)). The motion of June 4, 1956 in the then pending judicial proceeding alleged that the last admin-

physical persecution, but the latter provides that the alien "establish" merely his fear of persecution and delegates no special discretion to the Attorney General.

§243(h) of the 1952 Act

"(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time which he deems to be necessary for such reason."

§6 of the 1953 Act

"Sec. 6. Any alien who establishes that prior to July 1, 1953 he lawfully entered the United States as a bona fide non-immigrant and that because of events which have occurred subsequent to his entry into the United States he is unable to return to the country of his birth, or nationality, or last residence, because of persecution or fear of persecution on account of race, religion, or political opinion, may, within one year after the effective date of this Act apply to the Attorney General of the United States for an adjustment of his immigration status."

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istrative decision was "based upon no evidence of record" (App. 36) which could only have meant, and it was understood to mean, that it was based on the confidential information not of record. The petitioner's further cross-motion of August 13, 1956, in answer to respondent's cross-motion for summary judgment of July 17, 1956, states that "the special inquiry officer has apparently used information which does not appear of record" (App. 38). The last administrative hearing was devoted largely to petitioner's refutation of the summary of the confidential information. Petitioner's counsel asked for the evidence and the witnesses providing the confidential information and objected to the use of confidential information (R. 25). The special inquiry officer did not deny reliance on the confidential information (R. 17-19). Judge McGohey in his opinion did not state that the confidential information was not involved and his reliance upon the second *Dolenz* decision of the court below, involving the use of confidential information, indicates that he thought it was involved in this case. On this record it cannot fairly be asserted that confidential information was not the basis of the administrative decision and of the decisions of the courts below or that petitioner's counsel did not object to the use of confidential information throughout the case. Finally, any possible question in the matter is disposed of by the decision of the court below on the merits holding that confidential information was lawfully used.

Section 243(h) was deliberately changed to the present language merely requiring the Attorney General's "opinion" from the prior language (8 U. S. C. 156) which had prohibited deportation to a country in which the Attorney General "shall find" that the alien would be subject to physical persecution. *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C. A. 2). But §6 of the 1953 Act, although enacted after Congress made the change in §243(h) of the 1952 Act, adhered to the language used in the predecessor §4(b) of the Displaced Persons Act of 1948 (50 U. S. C. App. 1953). The deliberate adherence in the 1953 Act to the language of the 1948 Act, requiring the alien to "establish" merely his *fear* of persecution (rather than to satisfy the Attorney General's opinion of the *fact* of prospective *physical* persecution), and requiring the Attorney General to report to Congress all the pertinent facts in the case if he shall "determine" that (a) the alien was of good moral character, (b) physically present in the United States at the requisite time, and (c) admissible to the United States under the 1952 Act, makes it plain that Congress reserved to itself the determination whether persecution or fear of persecution had been satisfactorily established and delegated no special or extraordinary discretion on this issue to the Attorney General. *Cheng Fu Shen* v. *Barber*, 144 F. Supp. 913, 916 (N. D. Cal.); *D'Antonia* v. *Shaughnessy*, 139 F. Supp. 719, 723 (S. D. N. Y.).[4]

In the absence of express statutory authority to use confidential information (as in §235(c) of the 1952 Act,

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[4] When used in relation to administrative proceedings words such as "establish" and "determine," unlike words such as "opinion" or "discretion," indicate a legislative intention to require an adjudication based on substantial evidence. *Gooch Milling Co.* v. *Commissioner*, 133 F. 2d 131, 137 (C. A. 8); *Cole* v. *Saranac Lake General Hospital*, 282 App. Div. 626, 125 N. Y. S. 2d 891 (3rd Dept.).

8 U. S. C. 1225(c)), or language plainly delegating the decision entirely to the Attorney General's discretion or opinion (*Jay* v. *Boyd, supra*), the 1953 Act should not be construed as intending a departure from customary administrative hearing procedure in which the use of confidential information would be barred. Congress contemplated an administrative hearing at which the alien would have an opportunity to "establish" his eligibility on the issue of fear of persecution and the Attorney General would make a "determination" of the facts on the particular issues delegated to him for decision. The necessary implication from the statutory provision contemplating a hearing is that confidential information could not be used because a "hearing" followed by a decision based upon undisclosed confidential information is no hearing at all. *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9); *Boudin* v. *Dulles*, 136 F. Supp. 218, aff'd 235 F. 2d 532 (C. A. D. C.); *Mazza* v. *Cavicchia*, 15 N. J. 496, 101 A. 2d 545.[5]

2. *Regulations.*—The published regulations, which have the force and effect of law (8 U. S. C. 1103; *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 265), in respect of adjustment of status under the 1953 Act (8 C. F. R. Part 245a) provide in part that the immigration officer who hears the case shall prepare a memorandum of his findings as to each of the essential facts and transmit the record to the regional commissioner who shall approve or disapprove

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[5] Chief Justice Arthur T. Vanderbilt stated:

"In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' • • • [U]nless this principle is observed, the right to a hearing itself becomes meaningless."

the immigration officer's recommendation (8 C. F. R. 245a.11). If a denial is recommended a copy of the memorandum shall be furnished to the applicant or his attorney pursuant to §§292.11 and 292.12. Section 292.11(b) provides that whenever an examination is provided for by the regulations the person involved shall have the right to be represented at the examination by an attorney who shall be permitted to examine or cross-examine witnesses and to introduce evidence. It is submitted that these regulations providing for cross-examination, which was denied in this case by refusal to produce the informants who had supplied the confidential information, and the absence of any express regulation authorizing the use of confidential information in these proceedings, imply that the use of confidential information in these proceedings under §6 of the 1953 Act is not authorized.[6]

3. *Rule of construction.*—This Court has repeatedly stated that an immigration statute, in the absence of plain language requiring it, will not be construed as authorizing an exercise of authority which raises serious constitutional questions. *United States* v. *Witkovich*, 353 U. S. 194, 202; *Chew* v. *Colding*, 344 U. S. 590; *Sung* v. *McGrath*, 339 U. S. 33. The petitioner submits that §6, construed to grant authority to deny him a permanent residence on the basis of confidential information even though he has resided uninterruptedly in the United States since 1939, denies him due process of law under the Fifth Amendment of the Constitution to which he is entitled as a person residing in the United States.

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[6] The regulation (8 C. F. R. 242.17(c)) permitting the use of confidential information in determining applications for discretionary relief from deportation is not in terms applicable to a separate proceeding under §6 of the 1953 Act which is not technically an application for relief from deportation under the 1952 Act.

II.

The use of confidential information violated the Administrative Procedure Act.

The court below in its opinion did not rule expressly on the petitioner's contention below that §§5, 7, 8 and 10 of the Administrative Procedure Act of 1946 (5 U. S. C. 1004 ff.) apply to hearings under §6 of the 1953 Act and forbid the use of confidential information. The absence in the 1953 Act of an express provision, similar to the provision of §242(b) of the 1952 Act (8 U. S. C. 1252) prescribing exclusive procedure for determining deportability, leaves applicable §§5, 7 and 8 of the 1946 Act to administrative hearings to determine eligibility for permanent residence under §6 of the 1953 Act. Section 12 of the 1946 Act (5 U. S. C. 1011);[7] *Fong Sen* v. *Immigration and Naturalization Service*, 137 F. Supp. 236 (E. D. La.), aff'd 234 F. 2d 656 (C. A. 5); cf. *Marcello* v. *Bonds*, 349 U. S. 302.

Section 7(c) of the 1946 Act (5 U. S. C. 1006) expressly provides that every party shall have the right "to conduct such cross-examinations as may be required for a full and true disclosure of the facts." Section 7(d) provides in part that the testimony and exhibits, together with other papers filed in the proceeding, shall constitute the "exclusive record" for decision in accordance with §8 of the Act. Section 10(e) (5 U. S. C. 1009) provides that agency action may be set aside if unsupported by substantial evidence in any case subject to §§7 and 8 of the Act.

The petitioner submits that the use of confidential information violated the provisions of the Administrative

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[7] "Sec. 12 • • • No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. • • • "

Procedure Act and presents an important question and also presents a conflict with the Fifth Circuit which should be reviewed and resolved.

III.

Denial of due process of law by use of confidential information.

The petitioner urges that the use of confidential information, if authorized by Congress, denied him the due process of law to which he is entitled as a resident of the United States. *Chew* v. *Colding, supra; Sung* v. *McGrath, supra; Bridges* v. *Wixon*, 236 U. S. 135; *The Japanese Immigrant Case*, 189 U. S. 86. Section 235(c) of the 1952 Act, permitting the exclusion of an alien applying for admission on the basis of confidential information, the disclosure of which the Attorney General in his discretion and after consultation with appropriate security agencies concludes would be prejudicial to the public interest, goes to the verge of the constitutional power of Congress. *Shaughnessy* v. *U. S. ex rel. Mezei*, 345 U. S. 206; *U. S. ex rel. Knauff* v. *McGrath*, 338 U. S. 537. The petitioner having entered the United States lawfully in 1939 and having lived here uninterruptedly since that time cannot be relegated to the position of an alien seeking to enter and lacking constitutional rights and be denied a permanent residence under §6 of the 1953 Act and deported to Communist China under the 1952 Act without a due process hearing. *Chew* v. *Colding, supra.* The use of confidential information denied him a fair hearing and due process of law.

IV.

Denial of due process by an arbitrary decision.

Even if revelation of the alleged substance of the confidential information validated its use, or even if (contrary to the decision below) it had not been used, nevertheless the adverse administrative decision denied petitioner due process of law because it was completely contrary to all the evidence and wholly arbitrary. The indisputable facts that petitioner, educated in the United States and professing attachment to our institutions, had repeatedly refused to rejoin his family in China, supported the conclusion that he reasonably and honestly feared political persecution if returned to China. Significantly the denial of relief was not based, as the regulations required, on findings "as to each of the essential facts prescribed by section 6" (8 C. F. R. 245a.11) but merely upon a general conclusion that petitioner failed to establish reasonable grounds of fear of persecution (R. 19).

The petitioner submits that the whole record indicates that the administrative decision was actually not a determination on the facts but merely an expression of a policy decision of the Service that petitioner, against whom confidential information had been lodged, and which he clearly refuted, and whose family had chosen to return to China, should be denied all discretionary relief including suspension of deportation, stay of deportation and finally, permanent residence under §6. This view that petitioner is the victim of a policy decision to get rid of him on any ground is supported by the fact that the Service first held that the confidential information made him inadmissible as an alien seeking to enter the United States to engage in activities prejudicial to the public interest (§212(a)(27)), but when required to reveal the confiden-

tial information and support that charge, the Service abandoned this ground and retreated to the safer position that petitioner was unable to "satisfy" the special inquiry officer that he feared persecution.

The fact that this was a mere policy decision and not an administrative decision on the record is also supported by the consideration that other Chinese aliens similarly situated, except for return of petitioner's family to China and the use of confidential information against him, have been granted permanent residence under §6 upon their testimony concerning their opposition to Communism and fear of persecution in China. *Matter of T.-C.*, Interim Decision No. 212, decided November 7, 1950 (reported in Immigration and Naturalization Service "Monthly Review," December 1950, pp. 95-98);[8] cf. Lowenstein, *The Alien and the Immigration Law* (1958), pp. 130-137. It is also significant, as bearing on the question whether petitioner obtained a decision on the merits of his application, that the Commissioner ruled generally that in the absence of "positive affirmative proof that he [the alien] would be welcomed by the authorities in Communist China because of his express and implied sympathy for or cooperation with the present regime" deportation should be stayed pending a study of treatment of persons deported to China. *In re Lee Sung*, A 7921505, dated June 14, 1957,

[8] This decision states in part:

"FEAR TO RETURN: The applicant's testimony above related to displacement based upon his fear of persecution will be utilized to establish that other cardinal eligibility requisite, namely, that the applicant is unable to return to the country of his birth, nationality, or last residence because of persecution or fear of persecution on account of his race, religion, or political opinions. His testimony with respect to his opposition to Communism, and the acknowledgment that China is at this time a Communist-dominated country establishes that the applicant is unable to return to China because of his fear of persecution on account of his political opinions."

extending former decision of October 31, 1956, conveniently set forth in *The Alien and the Immigration Law, supra,* p. 283.[9]

The insubstantial nature of the confidential information also discloses that it could not be made the basis of a reasonable decision that petitioner did not fear persecution if returned to China. The First Charge in the confidential information to the effect that petitioner had a close relationship with his half-brother and father, was

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[9] This decision followed the comments in the Report on the Administration of the Immigration and Nationality Act, dated February 28, 1955, for the House Committee on the Judiciary, which in respect of stay of deportation under §243(h) of the 1952 Act stated in part (pp. 69-70):

> "Similarly, few officers of the Service now vested with discretionary powers to make decisions under section 243(h) are possessed of sufficient knowledge of the past, recent, and current history of the many countries of Europe and Asia where physical persecution for political reasons is a matter of everyday practice. Not many of them know how Soviet terrorism operates behind the Iron Curtain and whom and why it singles out for destruction. In many cases brought to the attention of the task force by sources preferring to remain anonymous, apparently well justified claims of fear of persecution in at least three countries now dominated by international communism have been flatly rejected without the presentation of anything even remotely resembling a factual rebuttal of the claims made by the deportee.
>
> *It is respectfully suggested that the committee may deem it necessary to take up the matter of administration of section 243(h) directly with the Secretary of State and the Attorney General, with a view toward developing a definite policy to guide those who may pass on applications to 'withhold deportation.' It is further submitted that the above recommendation appears to be urgent not only from the point of view of humanitarian aspects of the problem, but also for considerations involving broader foreign policy of the United States and this country's position of leadership among free nations* (italics in original).
>
> The fact that the exercise of discretionary power under section 243(h) appears to be unreviewable in courts (see *U. S. ex rel. Dolenz* v. *Shaughnessy, supra*) probably contributes to the urgency of the above recommendation."

convincingly refuted by petitioner's testimony that he had not seen his half-brother since the Bretton Woods Conference in 1944 (R. 27-28) or his father since his return to China in 1946 (R. 29, 32).

On the Second Charge, petitioner's former testimony that he had been favorably impressed with early activities of the Chinese Communists, he explained that he was influenced by the proposed land reforms of the Communists and the reported corruption of the Nationalist Government (R. 34-36). These views were constantly expressed in our press and widely held. He testified to his disillusionment and recognition that Communism had brought a repugnant terrorism and regimentation to China (R. 36). The petitioner denied (Third Charge) connection with the Chinese Christian Students Association or support of communism as better than capitalism (R. 36-37); admitted (Fourth Charge) dancing professionally for a fee at the Peoples' Drama Theatre but denied knowledge of the alleged political motives of the sponsors (R. 39). On the Fifth Charge of reported close association with an alleged Communist, petitioner explained that they were roommates for a time because of mutual interest in professional dancing but did not share political interests (R. 39-41). The petitioner admitted membership in the American Youth for Democracy (Sixth and last Charge) for a short time in 1943 while attending St. John's College and explained that at the time the chapter was devoted to the common war effort (R. 42).

On the issue of fear of persecution petitioner gave sworn testimony that he did not agree with Communism in principle; that for refusal to work as an entertainer for the Chinese Communist Government he might be made an example and imprisoned (R. 43); that he would be regarded with great suspicion in Communist China for his repeated

refusals to return there voluntarily and because of his education in the United States and attachment to our traditions (R. 42-43). He testified that he had never been actively in favor of communism and has been against communism and is actually afraid of persecution if returned to China (R. 45).

This Court has repeatedly stated that an administrative decision under the immigration laws which is not supported by the evidence is arbitrary and capricious and denies an alien residing in the United States due process of law. *Lloyd Sabaudo* v. *Elting,* 287 U. S. 329, 335, 336; *U. S. ex rel. Vajtaur* v. *Commissioner,* 273 U. S. 103, 106; cf. §242(b) (8 U. S. C. 1252(b)). The petitioner submits that the record discloses that he was denied a favorable administrative decision and reference of his case to Congress for consideration of grant of permanent residence under §6 of the 1953 Act although all the evidence required the conclusion that he had established fear of persecution if deported to China. The denial of his application actually was based upon the fact that refuted confidential information had been lodged against him and that members of his family had chosen to return to China, and a denial on this basis was arbitrary and capricious and denied him due process of law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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February 10, 1958.

APPENDIX

Opinion of the Court of Appeals

* * * * *

Before:

CLARK, *Chief Judge*,
MOORE, *Circuit Judge* and LEIBELL, *District Judge*.

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LEIBELL, *District Judge*:

Petitioner is a native and citizen of China. He entered the United States on February 3, 1939, under Section 3(1) of the Immigration Act of 1924, as a member of the family of a Chinese government official associated with the Consul General in New York. The petitioner's status was dependent upon the continuance of his father's status. Petitioner's father terminated his work here and returned to China in 1946. Petitioner, his mother, a brother and a sister remained here and were subjected to deportation proceedings.

In connection with the deportation proceedings petitioner and members of his family applied for suspension of deportation under the provisions of Section 19(c)(2)(b) of the Immigration Act of 1917, as amended July 1, 1948 (62 Stat. 1206).[1] By an order dated May 11, 1950 the

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[1] "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * *; (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds * * *; (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective

Board of Immigration Appeals granted the application of all four persons for suspension of deportation and on June 1, 1950 their cases were referred to Congress, in accordance with the provisions of the Act.

On December 27, 1950, the Commissioner moved before the Board of Immigration Appeals requesting that the outstanding order of the Board dated May 11, 1950, granting the petitioner and three others suspension of deportation be rescinded; that steps be taken to withdraw the cases from Congress; and that the proceedings be reopened for further consideration. In support of its motion the Commissioner stated that a communication had been received from the local immigration office stating that petitioner's mother and his sister had returned to China; and that a further investigation was desired before the immigration status of the remaining members of the family, petitioner and his brother, was legalized. By an order dated January 31, 1951, the Board of Immigration Appeals granted the motion of the Commissioner; rescinded their prior order of May 11, 1950, and ordered that the proceedings in the cases of petitioner and his brother "be reopened for such further consideration as may be appropriate." Subsequently petitioner's brother also returned to China.

On July 26, 1951, petitioner was granted a hearing before an Immigration Special Inquiry Officer in New York, in order to afford petitioner an opportunity to show why he should not be deported from the United States. There

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date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension." [Subsection (d) is inapplicable to the alien petitioner in this case.]

was considerable delay, but finally on December 4, 1952, the hearing officer rendered a decision denying the applica-

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tion of petitioner, and he ordered that petitioner "be deported from the United States pursuant to law on the charge stated in the warrant of arrest," dated June 7, 1949, his failure to maintain an exempt status.

A warrant ordering that petitioner be deported to China at the expense of the United States government was issued on December 4, 1952. Petitioner received a number of postponements and finally on November 17, 1954, he executed an affidavit which he served upon the immigration authorities in the deportation proceeding. The affidavit recited that he had been ordered to surrender into the custody of the Immigration and Naturalization Service for deportation to China via Hong Kong on November 22, 1954, pursuant to formal demand dated October 22, 1954; that he wished a stay of execution of the order of December 4, 1952, under Section 1253(h) of Title 8 U. S. C. A. on the ground that the mainland of China is under the control of a communistic government, and that if he were deported to China he would be subjected to physical persecution. The affidavit also stated that petitioner was "concurreatly submitting an application for adjustment of [his] status under Section 6 of the Refugee Relief Act of 1953" [50 U. S. C. App. §1971d];[2] and he requested

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[2] "Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, * * * may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically

that the proceedings which led to the order of petitioner's deportation be reopened and reconsidered. On November 23, 1954, petitioner filed an "Application to Adjust Immigration Status under Section 6 of the Refugee Relief Act of 1953."

On May 5, 1955, petitioner was given a hearing before a Special Inquiry Officer, on his application seeking adjustment of his immigration status under Section 6 of the Refugee Relief Act of 1953. On May 10, 1955, the Special Inquiry Officer recommended that petitioner's "application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953, be denied for the reason that he is not presently qualified for admission into the United States under the provisions of the Immigration and Nationality Act," holding in part that on "the basis of confidential and secret information of a nature which prohibits its disclosure to the applicant however, it is concluded that were the applicant at this time seeking admission to the United States, he would be inadmissible to this country under the provisions of Section 212(a)(27) of the Immigration and Nationality Act of 1952" [T. 8 U. S. C. §1182(a)(27)].[3] On June 16, 1955

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present in the United States on the date of the enactment of this Act [August 7, 1953] and is otherwise qualified under all other provisions of the Immigration and Nationality Act [chapter 12 of Title 8] except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case."

[3] §1182 Excludable classes of aliens; non-applicability to certain aliens; waiver of requirements; parole of aliens; report to Congress; suspension of entry by President

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

• • • • •

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United

the recommendation was approved by the Acting Regional Commissioner.

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On May 26, 1955, petitioner was given a hearing before a Special Inquiry Officer on his application for relief under Section 1253(h) of Title 8 U. S. C. A.[4] On May 31, 1955, the Special Inquiry Officer recommended that petitioner's application be denied and "that the deportation of the applicant alien to China be not withheld on the ground that the alien would be subject to physical persecution therein." The recommendation was based in part also upon "confidential and secret information" not disclosed to the petitioner. The recommendation was approved by the Acting Regional Commissioner on June 15, 1955. On June 21, 1955, the District Director wrote petitioner and made a formal demand upon him to surrender to the Deportation Control Officer on July 6, 1955, for deportation to China. Then followed proceedings in the United States District Court for the Southern District of New York, in an action for a declaratory judgment under the Administrative Procedure Act.[5]

On July 1, 1955, petitioner's attorney obtained an order to show cause on a motion for an order of the court staying the execution of the order of deportation against the

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States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;

[4] [§1253]

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason. June 27, 1952, c. 477, Title II, ch. 5, §243, 66 Stat. 212.

[5] T. 5 U. S. C. §1009(b); *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

petitioner, pending a hearing and determination of petitioner's court petition filed June 30, 1955, requesting a review of the orders and decisions of the Hearing Officer and Regional Commissioner. The Court Clerk's docket entries disclose that petitioner's attorney on July 12, 1955, filed an amended petition and that on July 21, 1955, he filed a further amended petition. On August 25, 1955, the respondent filed a cross-motion to dismiss the petition on

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its merits. Both petitioner's motion and respondent's cross-motion came on for a hearing before Judge Noonan on September 6, 1955.

From the foregoing it appears that when the court proceedings were instituted petitioner had applied to the Immigration authorities for adjustment of status under 50 U. S. C. App. 1971d (the Refugee Relief Act of 1953, §6) and for a stay of deportation under 8 U. S. C. §1253(h); and that these applications had been denied by the Immigration authorities on the grounds that secret and confidential information established that petitioner was ineligible for such adjustment of status because he was not otherwise qualified under the nonquota provisions of the Immigration and Nationality Act, namely 8 U. S. C. §1182(a)(27) and that the applicant's deportation should not be withheld because he would not be subject to physical persecution in China.

On review Judge Noonan remanded the Section 6 proceeding for further hearing. In his view deportation of petitioner, a resident alien, pursuant to 8 U. S. C. §1182(a)(27) on secret information would be unconstitutional as a deprivation of procedural due process, and therefore Congress must have intended a full-fledged hearing by the Attorney General under the Refugee Relief Act of 1953 to determine an alien's eligibility under the nonquota provi-

sions of the Immigration and Nationality Act. Further, such intent is obvious from Congress' use of the clause "the Attorney General shall, upon consideration of all the facts and circumstances, determine." That clause requires a hearing at which the alien has the opportunity to rebut unfavorable evidence; so the government must divulge the broad outlines of the confidential information in order that petitioner may rebut it, if possible.

On the further administrative hearing following the remand the government divulged the "categories" of secret

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information and petitioner testified in rebuttal. This time, instead of denying petitioner's application on the grounds that he was ineligible under the nonquota provisions, the immigration authorities said that he had failed to establish that he was unable to return to Red China because of fear of persecution. Petitioner claims that this decision was arbitrary and capricious and that the use of confidential information in arriving at it was unlawful and unconstitutional.

Petitioner sought a court review of that decision in an action under the Declaratory Judgment Act, T. 28 U. S. C. §2201 instituted in the District Court on the filing of a "petition" (not a "complaint") on June 30, 1955. He contended before Judge McGohey that such determination was against the evidence and against the weight of the evidence. He did not mention any alleged unlawful or unconstitutional receipt of evidence. Judge McGohey ruled against petitioner, denied the motion to review and granted the government's motion for summary judgment, and entered an order to that effect.

Under 8 U. S. C. §1253(h), the Attorney General is authorized to withhold deportation of an alien to any country in which, in his opinion, the alien would be subject to

physical persecution. We held that the Commissioner, in denying an application under this section, could resort to confidential information outside the record without denying a resident alien procedural due process. *U. S. ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 206 F. 2d 392. The Commissioner's decision under the Refugee Relief Act, §6, whether or not the alien has established that he is unable to return to the country of his birth because of fear of persecution is the same kind of decision, i.e., it depends not only upon the petitioner's background, but on conditions in the country of his birth. Congress apparently intended no different procedure in ascertaining these conditions for

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the purposes of a Section 6 application. Further, here the Commissioner did inform petitioner of the confidential information on which the decision in part was based. Although petitioner was not informed of the source of this information, he was given the opportunity to rebut it. The information (which the petitioner admitted and explained) can be interpreted to show that he will not be persecuted upon his return to Red China. The Commissioner's conclusion is thus far from arbitrary or capricious.

Petitioner also argues that the language of Section 6 indicates that Congress intended a full-fledged hearing on Section 6 applications—unlike the hearing intended on applications under 8 U. S. C. §1253(h). This was the basis for Judge Noonan's decision. But here we are concerned with that part of Section 6 which says that after the alien establishes that he is unable to return to his country because of fear of persecution he may apply to the Attorney General for adjustment of status. The portion of the statute with which Judge Noonan was concerned says that the Attorney General will then determine on all the facts and circumstances that petitioner is otherwise eligible under the nonquota provisions of the Immigration and

Nationality Act. We cannot read into the word "establish" the type of hearing which petitioner claims is intended (i.e., that the informants who were the source of the confidential information should be produced for cross-examination by the alien), particularly because of the "political" type of decision required of the Commissioner regarding fear of persecution.

The order of the District Court, dated November 17, 1956, is affirmed.

Second Amended Petition

The petitioner, Cha'o Li Chi, also known as Cha'o Pieh Chi, for his amended petition herein by his attorney, Stanley Law Sabel, respectfully alleges and shows to this Court as follows:

1. That this action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.) relates to proceedings arising under the Immigration and Nationality Act and the Refugee Relief Act of 1953; jurisdiction is vested in this Court pursuant to the Declaratory Judgment Act, the Immigration and Nationality Act, and Section 10 of the Administrative Act.

2. That respondent is the duly appointed and Acting District Director of Immigration for the New York District. This action involves, in part, the constitutionality of a statute of the United States and requires adjudication thereon by a three-judge court.

3. That petitioner is a resident alien, having resided in the United States since February 3, 1939, when he was admitted to the United States under Section 3(1) of the Immigration Act of 1924; and petitioner is now 28 years

of age and has resided in the United States since entering it at the age of 11 years.

4. That under date of October 22, 1954, demand was made upon petitioner to surrender into the custody of the Immigration and Naturalization Service for deportation on November 22, 1954.

5. That on November 18, 1954, application was made on petitioner's behalf pursuant to Section 243(h) of the Immigration and Nationality Act for a stay of deportation on the grounds that petitioner would be subject to physical persecution if he were deported to China.

6. That on May 26, 1955, a hearing was held under Section 243(h) before Special Inquiry Officer Ira Fieldsteel, who rendered his decision and his recommendation as follows:

> "RECOMMENDATION: It is recommended that deportation of the applicant alien to China be not withheld on the ground that the alien would be subject to physical persecution therein, and
>
> IT IS FURTHER RECOMMENDED that the record herein be forwarded to the Regional Commissioner, Northeast Region, for review."

7. That on or about November 24, 1954, an application was filed on behalf of petitioner to adjust his immigration status under Section 6 of the Refugee Relief Act of 1943.

8. That on or about the 5th day of May, 1955, examination of petitioner was held before Special Inquiry Officer Lennox P. Kanzler, of petitioner's application under Section 6 of the Refugee Relief Act, who rendered his decision on May 10, 1955, with the following recommendation:

"RECOMMENDATION: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953, be denied for the reason that he is not presently qualified for admission into the United States under the provisions of the Immigration and Nationality Act."

9. In the findings of the Special Inquiry Officer Kanzler, under Section 6 of the Refugee Relief Act, he found as follows:

"On the basis of confidential and secret information of a nature which prohibits its disclosure to the applicant, however, it is concluded that were the applicant at this time seeking admission to the United States he would be inadmissible to this country under the provisions of Section 212(a)(27) of the Immigration and Nationality Act. Section 6 of the Refugee Relief Act requires among other things that the applicant be otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable be oversubscribed. This applicant, in view of the foregoing, is not otherwise admissible to the United States and accordingly will be denied on that ground."

10. That the petitioner herein filed timely objections to the recommendations and findings of the Special Inquiry Officers and briefs were submitted on behalf of the petitioner to the Regional Director at Burlington, Vermont.

11. That on June 15, 1955, the Acting Regional Commissioner adopted the findings of the Inquiry Officer on the application under Section 243(h) as follows:

"It is ordered that the deportation of the alien to China be not withheld on the ground that the alien would be subject to physical persecution."

12. That on June 16, 1955, the Acting Regional Commissioner adopted the findings of the Special Inquiry Officer under the proceedings under Section 6 of the Refugee Relief Act approving the denial of the application.

13. That by virtue of said orders and decision of the Acting Regional Commissioner the said order of deportation becomes final and petitioner herein has exhausted his administrative remedies.

14. That there has been a denial of due process of law in the following respects.

(a) Petitioner's application under Section 6 of the Refugee Relief Act was denied arbitrarily and without sufficient evidence.

(b) The decision in said Section 6 proceeding was predetermined and not based on evidence presented at the hearing.

(c) The decision in both proceedings based on confidential and secret information not disclosed to the petitioner

(i) deprived petitioner of the opportunity of refuting the "evidence",

(ii) resulted in findings unsupported by evidence; and

(iii) deprived petitioner of an opportunity for effective judicial review.

(d) The proceedings were conducted without procedural due process.

(e) Petitioner has been deprived of a full and fair hearing.

(f) The Hearing Officers rendered arbitrary decisions and failed to make reasoned determination of the issues involved.

(g) The Hearing Officers were not qualified to pass upon the application.

15. Section 212(a)(27) of the Immigration and Nationality Act as interpreted and applied by the Special Inquiry Officer in said Section 6 proceeding is unconstitutional and void as depriving the petitioner of due process of law in violation of the Fifth Amendment to the United States Constitution.

16. That petitioner is without any speedy or adequate remedy at law.

17. That there exists between petitioner and the defendant a controversy in that petitioner maintains that the acts and threatened acts herein complained of are illegal and void for the reasons hereinabove set forth, while the defendant maintains on the other hand that the said acts are lawful in all respects.

WHEREFORE, petitioner prays that this Court (1) review the orders of the Hearing Officers and Regional Commissioner; (2) issue a temporary injunction staying the execution of the aforesaid order of deportation pending final determination of the issues in this action by this Court; (3) declare the orders of the Hearing Officers, as adopted by the Regional Director, to be null and void; (4) issue a temporary and permanent injunction restraining the enforcement, operation and execution of Section 212(a)(27) of the Immigration and Nationality Act against peti-

tioner for repugnance to the Constitution of the United States; and (5) Grant such other and further relief as may be just and proper.

STANLEY LAW SABEL

(Verified July 20, 1955 and filed July 21, 1955.)

Petitioner's Motion for Review of June 4, 1956

The petitioner above named, by his attorney, Marvin M. Neuman, Esq., submits the within Motion to Review an Administrative Decision, upon the following bases of facts:

1. This is an action for a declaratory judgment, under the Declaratory Judgment Act (2 U. S. C. 2201), and for review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.), and under the Immigration and Nationality Act (8 U. S. C., 1 et seq.).

2. On September 30, 1955, the Hon. Gregory F. Noonan, Judge, United States District Court, Southern District of New York, published the Opinion in this matter, followed by Order, signed on December 2, 1955.

3. Pursuant to said Opinion and Order, the Defendant-Respondent conducted an examination of the Plaintiff-Petitioner, said examination having taken place on March 27, 1956.

4. On April 10, 1956, the appropriate Hearing Officer of the Defendant-Respondent prepared a recommendation denying the alien's application for adjustment of status.

5. On May 17, 1956, the Regional Commissioner ordered that the application be denied. Attached hereto and made a part hereof is the final administrative order entered in this matter.

6. It is submitted that the final administrative determination is against the evidence and is against the weight of the evidence.

7. It is submitted that the recommendation of denial is based upon a conclusion reached by the Defendant-Respondent, which conclusion is based upon no evidence of record.

8. It is submitted that the alien has established beyond question a reasonable and legitimate fear of persecution, if returned to his native country, and that the conclusion reached by the administrative officers that he has failed to establish reasonable grounds on which to fear persecution is an arbitrary and capricious determination.

WHEREFORE, the Petitioner prays for a judicial review of the aforesaid determination, and for such other relief that to the Court may seem proper.

Respectfully submitted,

MARVIN M. NEUMAN
1776 Broadway
New York 19, New York

Dated: New York, New York
June 4, 1956.

Petitioner's "Brief sur Petition and Review and Contra Cross Motion" of August 13, 1956

* * * * *

At the time that the applicant was re-examined, the Special Inquiry Officer was specifically asked to hear the matter de novo. The reason for the request was that this Court had declared the previous decisions of the defendant to be null and void. It is believed that if the decisions are null and void, the evidence or allegations upon which those decisions rested, would necessarily have to be re-examined and reconsidered. However, in the recommendation of the Special Inquiry Officer, approved by the Acting Regional Commissioner, the copy of which has been attached to this Brief, there is no indication that the Special Inquiry Officer took into account anything except the unsupported allegations contained in his file and the absolute denials by the plaintiff-petitioner. It is stated that "Despite the applicant's categorical denial of the allegations contained in the confidential and secret information * * * it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution. * * *" In other words, the Special Inquiry Officer has apparently used information which does not appear in the record, notwithstanding the absolute denial of the truth of the allegations. The allegations are not supported by any evidence. The denial of these remarks by the plaintiff-petitioner is more than adequately established.

It is urged that the applicant has proven his own reasonable fear of persecution if returned to his native country, by reason of his political differences with the Communist Government of China.

Respectfully submitted,

MARVIN M. NEUMAN
Attorney for Plaintiff-Petitioner

Dated: New York, New York
August 13, 1956.

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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHA'O LI CHI, PETITIONER

v.

JOHN L. MURFF, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 23-31) is reported at 250 F. 2d 854. Opinions of the district court appear at R. 34-42 and App. 3a-9a and at App. 12-15a.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1957. The petition for a writ of certiorari was filed on February 17, 1958. The juris-

[1] "App." designates petitioner's appendix in the Court of Appeals, now included in the record before this Court. "R." designates the immigration file which has been paginated and lodged herewith.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the hearing given petitioner (a person concededly subject to deportation), pursuant to his application for adjustment of status under Section 6 of the Refugee Relief Act of 1953, at which he was afforded full opportunity affirmatively to establish his claim of fear of persecution, advised of the content of confidential information considered on that issue, and granted full opportunity to rebut it, was invalid for the reason that the source of the government's information was not divulged to him.

2. Whether the administrative decision that petitioner had failed to establish a rational basis for the asserted fear of persecution was arbitrary and capricious.

STATUTE INVOLVED

Section 6 of the Refugee Relief Act of 1953, 67 Stat. 400, as amended, 68 Stat. 1044, provides in pertinent part:

> Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion * * * may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United

States on the date of enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. * * *

STATEMENT

On February 3, 1939, petitioner, a native and citizen of China entered the United States, under Section 3 (1) of the Immigration Act of 1924, as the son (11 years old at the time) of a Chinese government official. Petitioner's non-immigrant status, which depended on his father's official position, terminated when, in 1946, his father finished his work in this country and returned to China (R. 153). As a result, petitioner and the remainder of his family in this country (his mother, brother and sister) became subject to deportation (R. 184). Seeking to avoid expulsion, they applied for suspension of deportation. By order dated May 11, 1950, their applications were granted by the Board of

Immigration Appeals. Their cases were then referred to Congress for final approval. Thereafter, on December 27, 1950, the Commissioner of Immigration and Naturalization moved that the orders of suspension of deportation be rescinded, that the cases be withdrawn from Congress, and that the Board proceedings be reopened, stating that petitioner's mother and sister had returned to China and that there should be further investigation on the question of legalizing the immigration status of petitioner. On January 31, 1951, the Board rescinded the prior order of May 11, 1950, and reopened the proceedings as to petitioner and his brother "for such further consideration as may be appropriate" (R. 180-181). Petitioner's brother returned to China soon thereafter (R. 161).

On December 4, 1952, following a hearing (R. 156-179) before a Special Inquiry Officer pursuant to the order of reopening, petitioner's applications for suspension of deportation or voluntary departure were both denied, and he was ordered deported for failure to maintain an exempt status (R. 152-155). Petitioner did not seek administrative review of the order.

On November 17, 1954, petitioner applied both for a stay of deportation under Section 243 (h) of the Immigration and Nationality Act of 1952 and for adjustment of status under Section 6 of the Refugee Relief Act of 1953, claiming that if he were deported to the mainland of China he would be subject to persecution by the Communist government (R. 149-151). A formal application for Section 6 relief was filed on November 23, 1954 (R. 62-64). Separate hearings were given petitioner on each of these applications.

Following the hearing in the Section 6 proceeding (R. 97-111), the Special Inquiry Officer recommended that petitioner's application be denied. He found that petitioner had failed to meet the requirements of Section 6 because, if he were seeking entry into this country, he would be excludable under the provisions of Section 212 (a)(27) of the 1952 Act.[2] He based his recommendation in part upon confidential and secret information "of a nature which prohibits its disclosure to the applicant * * *" (R. 56). This recommendation was approved by the Acting Regional Commissioner on June 16, 1955 (R. 56).

On June 15, 1955, petitioner's application under Section 243 (h) was denied, also after hearing (R. 117-148), upon the ground that he had failed to show that he would be subject to physical persecution if returned to China and upon the basis of "confidential and secret information in possession of the Government * * *" (R. 114, 112-115).

Petitioner thereafter applied for a stay of deportation pending judicial review. Upon such review in the district court before Judge Noonan, petitioner claimed, *inter alia*, that he was denied due process in both administrative proceedings because of the use of confidential and secret information not disclosed to him. Judge Noonan found that a proper determination of

---

[2] Section 212 (a)(27) provides:

"(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

"(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;"

whether petitioner was qualified under Section 212 (a)(27), *supra*, fn. 2, and hence under Section 6, required that he be fully "informed of the nature of the information being used against him so that he might attempt to rebut it" (R. 40). He ordered that the Section 6 proceeding be remanded and petitioner informed of "the broad nature of the 'secret and confidential' information" (R. 34-42, 41). Judge Noonan thought such divulgence necessary because of the ground upon which the Section 6 application was denied. He pointed out (R. 39-40):

> The wording of the administrative decision in the Section 6 proceeding denies the petitioner's application not on the ground that he has no legitimate fear of persecution, but rather on the ground that he is not otherwise eligible according to the provisions of the Immigration and Nationality Act, and indicates that the secret and confidential information used did not go toward the decision on the question of fear of persecution, but rather that it affected that part of the proceeding referring to the provisions of the Immigration and Nationality Act.

As to the use of confidential information in the Section 243 (h) proceeding—which resulted in a denial of petitioner's application solely on the basis of the persecution issue—Judge Noonan found that the ruling in *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C.A. 2), holding that use of confidential information in a Section 243 (h) proceeding does not constitute a denial of due process, "presents an insurmountable barrier to [petitioner's] success" (R. 38-39).

Pursuant to Judge Noonan's order, a further hearing was held, on March 27, 1956, on petitioner's Section 6 application. At this hearing, the Special Inquiry Officer divulged, in six categories, the "broad nature" of the confidential and secret information, in summary as follows (R. 6):

(*1*). That petitioner had close relationships with his half-brother Chi Chao Ting, who was reported to be active in the Communist cause, and with his father, who was formerly editor of a Chinese newspaper published in New York and popularly known as a Communist publication; and that petitioner's father returned to the Chinese mainland to accept a teaching position at Peiping University under the sponsorship of the Chinese People's Republic;

(*2*). That petitioner himself testified that in the early days of the Communist regime in China he was favorably impressed;

(*3*). That petitioner was reported to have been active, in 1949, in the Chinese Students Christian Association, which was purportedly Communist controlled, and that at that time petitioner was reported to have upheld Communism as being superior to Capitalism;

(*4*). That petitioner had participated in a Communist-inspired brotherhood festival at the "Peoples Drama Theatre" on February 11, 1951;

(*5*). That petitioner was closely associated with one Kee Min Ta, who was reported to be active in Communist affairs;

(*6*). That petitioner was a member of the American Youth for Democracy, an organization reported to be active in Communist affairs.

The Special Inquiry Officer was of the view that this information indicated that petitioner was not "as anti-communistic in political opinion as would appear from his application for adjustment of status * * *" (R. 6). Petitioner was then afforded full opportunity to answer these specifications in detail. He denied each allegation insofar as it indicated any personal predilection on his part for Communism. He denied that he had a close relationship with his half-brother who, he understood, was a member of the Communist Party (R. 8-9); that his father had Communistic leanings, or returned to teach in Peking under the auspices of the Communists (R. 9-10); and that he himself was a member of the Chinese Students Christian Association (R. 17). He admitted membership in the American Youth for Democracy, but said that it was only for a few months during 1943, while he was a student at St. John's College, and only because the organization supported the New Deal and the war effort (R. 22). He admitted that in the early days of the Communist regime he was pleased with its land reforms (R. 14) and believed that the change from the Chiang Kai-shek government was a relief (R. 15-16), but stated that his views have now changed (R. 16).[3]

Additionally, petitioner sought affirmatively to establish his fear of persecution, stating that he did not "agree with communism on principle" (R. 22); that, if returned to China, he would not be able to practice his profession or "be proficient" as a dancer—although the Communist Government would be able to use him—because he did not "believe in the goals, the exhortation of the communist government" (R. 23); that it would

[3] His full rebuttal is set forth at R. 8-22 and App. 26a-42a.

mean "doing exactly what is assigned to me" (R. 22-23); that by refusing to perform he would "be made an example of" (R. 23); and that only early in the Communist regime had he preferred it over the Nationalists (R. 25). He further based his claim of fear of persecution on the grounds that he had not returned home with his family; that, despite repeated requests, he had continued to remain here; and that he believed that his family could not protect him from persecution (R. 23-24). Following this hearing, the Special Inquiry Officer concluded (R. 2):

> Despite the applicant's categorical denial of the allegations contained in the confidential and secret information, the broad and general nature of which was disclosed to the applicant, it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution because of his political opinion should he return to China, and his application for adjustment of status should be denied on that ground.

On May 9, 1956, the Acting Regional Commissioner approved this recommendation (R. 2).

On October 23, 1956, Judge McGohey denied petitioner's application to set aside this administrative decision, holding that "it cannot be said that [the Attorney General] acted capriciously, arbitrarily or unfairly in concluding that the petitioner has failed to sustain his burden of establishing reasonable grounds for his asserted fear of persecution if returned to China" (App. 15a; 12a-15a).

The Court of Appeals unanimously affirmed, pointing out that petitioner had been informed of the con-

fidential information and afforded an opportunity to rebut it (Pet. App. 23-31).

ARGUMENT

1. Petitioner's broad contentions that the consideration of confidential information by the Immigration and Naturalization Service, in denying his application for adjustment of status, violated the requirements of Section 6 of the Refugee Relief Act of 1953, *supra*, pp. 2-3, and of due process (Pet. 9-15), are not, in fact, the real issues in this case. For, pursuant to Judge Noonan's order, the proceeding was remanded for the very purpose of informing petitioner of "the broad nature of the 'secret and confidential' information being used against him" (R. 41). This information was thereafter divulged to petitioner, and he was granted full opportunity to rebut its implications. See the Statement, *supra*, pp. 7-8. Hence, the sole issue on this aspect of the case is whether the hearing granted petitioner was nonetheless rendered invalid because he was not also informed of the identity of the persons providing the information considered, and consequently not afforded an opportunity to cross-examine them.

a. No requirement for disclosure of the source of information has been enacted by Congress in the statute here involved. In fact, the Refugee Relief Act contains no provision whatever for a hearing in a Section 6 proceeding. Hence, petitioner's argument (Pet. 14-15) that he was entitled to a hearing in accord with the standards of the Administrative Procedure Act, 60 Stat. 237, as amended, is without foundation. Section 5 of the Administrative Procedure Act makes applicable the hearing provisions of Section 7 only where the "adjudication [is] *required by statute* to be determined on the record after opportunity for an agency hearing"

(emphasis added). See *Gutnayer* v. *McGranery*, 108 F. Supp. 290, 291-292 (D. D.C.), modified and affirmed on other grounds, *sub nom. Brownell* v. *Gutnayer*, 212 F. 2d 462 (C.A. D.C.). Moreover, Section 15 of the Refugee Relief Act (67 Stat. 400, 406) provides that "* * * all of the provisions of the Immigration and Nationality Act (66 Stat. 163) shall be applicable under this Act." Proceedings under the Immigration and Nationality Act are governed by the special provisions set forth therein rather than the Administrative Procedure Act. See *Marcello* v. *Bonds*, 349 U.S. 302.

The hearing standards under analogous provisions of the Immigration and Nationality Act of 1952 have been construed to permit the use of confidential information even where, unlike the situation in this case, the alien is not advised of the content of the information and hence not afforded an opportunity to rebut it. See *Jay* v. *Boyd*, 351 U.S. 345, where this Court sustained the use of confidential information in a proceeding for suspension of deportation under Section 244 (a), pointing out that such relief is "not a matter of right * * * [but] a matter of grace" (351 U.S. at 354), and that "§ 244 gives no right to the kind of a hearing on a suspension application which contemplates full disclosure of the considerations entering into a decision" (*id.* at 355). See, also, *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77-79. Again, in determining the hearing requirements under Section 243 (h) of the 1952 Act, which grants relief from deportation for reasons parallel to those under Section 6,[1] it has

[1] Section 243 (h) provides:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

been held that confidential information may be considered by the Attorney General and, in fact, "may be of great assistance to him in making his decision". *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 395 (C.A. 2). Such a proceeding does not involve the issue of the alien's "right to remain in the United States". *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288, 291 (C.A. 2), certiorari denied, 345 U.S. 928. See, also, *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316, 317 (C.A. 2), *Namkung* v. *Boyd*, 226 F. 2d 385, 388 (C.A. 9), and *Chiu But Hao* v. *Barber*, 222 F. 2d 821 (C.A. 9), stressing the limited scope of judicial review of an administrative decision denying relief under Section 243 (h).

A fortiori, the hearing accorded in a Section 6 proceeding—which likewise involves a matter of grace, not of right—suffices when not only is the alien given "full opportunity to testify and present evidence in support of his application * * *" (*United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316, 318 (C.A. 2)), but it also given a résumé of all other information considered, and afforded the chance to rebut it.

Petitioner seeks to distinguish between hearings under Sections 244 (a) or 243 (h) and those under Section 6, stating that the former provisions authorize a determination based upon the "opinion" or "discretion" of the Attorney General, while the latter grants no such broad executive discretion, providing only that the alien must "establish" fear of persecution in the administrative proceeding and that Congress must approve his application. But it cannot be presumed that Congress, in asking for a preliminary investigation by the Attorney General, intended that anything less than all available information should

be considered on the issue of persecution. "In providing a haven of refuge in the United States [under this Act], Congress also intended to provide adequate safeguards * * * against infiltration of subversives * * *". H. Rep. No. 1323, 83rd Cong., 2d Sess., p. 10. At the very least, considering the objectives of Section 6, its requirements are satisfied when, as here, the information considered was in fact divulged to petitioner and only the identity of the sources of the information was withheld. This is not a case in which, although the alien made out a *prima facie* case of fear of persecution, his claim was found unavailing for reasons not disclosed to him. As discussed *in* a, it is doubtful that, on his own testimony, petitioner made out a *prima facie* case of fear of persecution. But, assuming that he did, the fact is that the contrary considerations were disclosed to him and he was given an opportunity to rebut them. The case is thus similar to *United States* v. *Nugent*, 346 U.S. 1, where this Court had before it the issue of whether conscientious objectors seeking exemption from military service under Section 6 (j) of the Selective Service Act of 1948, 62 Stat. 604, as amended, are entitled to divulgence of F. B. I. reports considered by the Department of Justice in recommending to the appeal boards that the relief requested be denied. On that comparable issue, this Court held (346 U.S. at p. 6):

> * * * the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair

résumé of any adverse evidence in the investigator's report.

We submit that no more can be deemed required in a proceeding under Section 6. Like the applicant in *Nugent*, petitioner here had the burden of establishing a claim which might result in the granting of a privilege, as a matter of grace. His position was protected when he was given a résumé of the adverse information and an opportunity to rebut it.

Section 6 relief is so closely similar to the relief obtainable under Section 243 (h) that it must also be deemed to permit consideration of all relevant information on the issue of fear of persecution, at least where such information is divulged to the alien and he is afforded full opportunity to rebut it. Thus, both under Section 6 and 243 (h), complex political questions are involved—questions requiring evaluation of all available data. For example, it might be necessary to consider the alien's claim of persecution in the light of information concerning treatment afforded other aliens who had been denied relief and returned to Communist China; information as to the political beliefs of the alien and his family; and information as to the views expressed openly or secretly by Communist Chinese officials concerning the treatment that would be accorded to the alien if he were returned. Obviously, in order to obtain such information, free access to a network of sources is essential. To require that the government reveal these sources would curtail the effectiveness of its information-gathering facilities and cut off access to much pertinent material otherwise obtainable. The net result might be to preclude a full and complete evaluation of the alien's claim. Thus,

in some cases an alien's application might be denied because relevant information reenforcing his claim is unavailable, whereas in other cases missing information might show that there is no basis for apprehending persecution or that the alien is ineligible for relief for other reasons.

b. In view of the nature and purposes of the statute, petitioner's attempt to rely on the regulations promulgated thereunder (Pet. 12-13) is unavailing. 8 C.F.R. (1956 Supp.) 245a.11 requires the immigration officer to prepare a memorandum of his findings. This was done. 8 C.F.R. (1956 Supp.) 292.11(b) states that the alien shall have the right to counsel, that he may testify, introduce evidence and cross-examine witnesses. These requirements were also met. We do not believe that the provision for cross-examination can reasonably be construed as requiring the government to produce all persons, including those who may be abroad, from whom it has obtained information on the likelihood of persecution. If the government calls witnesses, the alien must, of course, be allowed to cross-examine them. But this does not preclude the government from requiring that the alien, who carries the burden of establishing fear of persecution, meet and explain the adverse information which it has concretely disclosed to him.

c. Petitioner's constitutional challenge to the proceedings (Pet. 15) is without foundation since the basic question as to whether he is entitled to remain in the United States has already been decided against him in admitted conformity with all constitutional requirements.[5] Petitioner is thus no longer "a part of our

[5] Petitioner never sought review of the order of deportation. See the Statement, *supra*, p. 4.

population" under any color of right, as distinguished from the situation in cases he relies upon (Pet. 15). See particularly *The Japanese Immigrant Case,* 189 U.S. 86, 100-101, where the complaint as to the procedure was made with respect to the basic proceeding which would itself determine whether the alien's stay in the United States was or was not lawful.

As to matters dealing not with that decisive aspect, but only with the collateral execution of the order of deportation, we think the law is as it was recently restated in *Carlson* v. *Landon,* 342 U.S. 524. In that case, as here, the formal proceedings to determine the alien's basic right to remain in the United States were not the subject of the dispute; the issue was the collateral matter of the Attorney General's decision on bail pending such proceedings, and it was resolved by this Court in favor of the Attorney General's power to act summarily. Certainly, where, as here, the basic determination of the alien's deportability has already been made, the collateral matter of adjustment of status is not one which, on constitutional grounds, must be made the subject of formal hearings. Particularly is this true where the alleged defect in the hearing is only in the failure to divulge the source of information which petitioner was given in résumé and afforded an opportunity to rebut. Cf. *United States* v. *Nugent,* 346 U.S. 1, 9-10; *United States ex rel. Dolenz* v. *Shaughnessy,* 206 F. 2d 392, 394-395 (C.A. 2).

2. Petitioner further challenges the instant decision as "completely contrary to all the evidence and wholly arbitrary" (Pet. 16-20). The fact is, however, that on his own testimony, without regard to adverse information, petitioner failed to meet his burden of proof. At best, his affirmative showing indicated a distaste for

Communism and a desire to remain in this country. His alleged fear of persecution rested only on the unsupported belief that he would be regarded with suspicion because he had not returned with his family to China. This despite the fact that others of his family have not been subjected to persecution, although they returned to China later than the father. Such speculation certainly does not establish the "rational basis" for fear of persecution which is held essential under the cases. See *Lavdas* v. *Holland*, 235 F. 2d 955, 957-958 (C.A. 3) (so construing Section 4 of the Displaced Persons Act of 1948, as amended, the predecessor of Section 6); *Fong Sen* v. *United States Immigration and Naturalization Service*, 137 F. Supp. 236, 237 (E.D. La.), affirmed, 234 F. 2d 656 (C.A. 5); *Lukman* v. *Holland*, 149 F. Supp. 312, 315-316 (E.D. Pa.). And compare *Chien Fan Chu* v. *Brownell*, 247 F. 2d 790, 793-794, where the Court of Appeals for the District of Columbia Circuit found a substantial basis for the claim of fear of persecution in a case in which the aliens were members of high-ranking Nationalist Chinese families that had actively opposed the Communist regime.[6] On petitioner's showing alone, Judge McGohey was correct in holding that the Attorney General had not "acted capriciously, arbitrarily or unfairly in concluding that the petitioner has failed to sustain his burden of establishing reasonable grounds for his asserted fear of persecution if returned to China" (App. 15a).

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[6] *D'Antonio* v. *Shaughnessy*, 139 F. Supp. 719, 723 (S.D. N.Y.), disagreed with the district court decision in the *Lavdas* case, 139 F. Supp. 514, 515 (E.D. Pa.), affirmed, 235 F. 2d 955 (C.A. 3), only in so far as that case, in dictum, indicated that fear of persecution must be limited to fear of the *de jure* or *de facto* government. It agreed, however, that the alien is required "to establish the existence of a reasonable fear of persecution."

Petitioner's failure to meet his statutory burden emphasizes the unsubstantiality of his procedural attack. This is not a case in which, after an alien had established fear of persecution, information outside the record was deemed sufficient to override his showing. Rather, this is a case in which, even if such information had not been considered, the decision would have been adverse to petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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